

THE UNITED STATES

DEPARTMENT OF THE ARMY

OFFICE OF THE CHIEF OF STAFF

MEMORANDUM FOR THE CHIEF OF STAFF  
SUBJECT: THE ARMY'S POLICY ON THE USE OF  
MILITARY FORCE IN THE CASE OF A  
NATIONAL EMERGENCY

THE ARMY'S POLICY ON THE USE OF  
MILITARY FORCE IN THE CASE OF A  
NATIONAL EMERGENCY

1. The Army's policy on the use of military force in the case of a national emergency is based on the following principles:

(a) The Army shall use military force only in the case of a national emergency.

(b) The Army shall use military force only in the case of a national emergency.

(70,000)

(26,946)

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1919.

No. 300.

FIDELITY TITLE AND TRUST COMPANY, ANCILLARY ADMINISTRATOR OF THE ESTATE OF VERNON W. PANCOAST, DECEASED, PETITIONER,

*vs.*

THE DUBOIS ELECTRIC COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

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12 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1918.

No. —.

THE DUBOIS ELECTRIC COMPANY, Plaintiff-in-Error,

VS.

FIDELITY TITLE AND TRUST COMPANY, Ancillary Administrator of the Estate of Vernon W. Pancoast, Deceased, Defendant-in-Error.

RECORD.

W. C. Miller, H. B. Hartswick, Attorneys for Plaintiff-in-Error.  
Sterrett & Acheson, Attorneys for Defendant-in-Error.

Original.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1918.

No. —.

THE DUBOIS ELECTRIC COMPANY, Plaintiff-in-Error,

VS.

THE FIDELITY TITLE & TRUST COMPANY, Ancillary Administrator of the Estate of Vernon W. Pancoast, Deceased, Defendant-in-Error.

Among the rolls, records and judicial proceedings had in the United States District Court for the Western District of Pennsylvania, at No. 1234 October Term, 1914, may be found the following words and figures:

*Docket Entries.*

Amended Nov. 17, 1915, as follows:

FIDELITY TITLE & TRUST COMPANY, Ancillary Administrator of the Estate of Vernon W. Pancoast, Dec'd," VERNON W. PANCOAST,

VS.

THE DUBOIS ELECTRIC COMPANY, a Corporation; THE DEPOSIT NATIONAL BANK, a Corporation, and JOSEPH BENSINGER.

Vernon W. Pancoast, Sterrett and Acheson.  
Miller & Hartswick.

Oct. 6, 1914. Præcipe for Summons filed.

Oct. 6, 1914. Summons in Trespass issued ret'ble to 1st Mon. of Nov. next.

Oct. 6, 1914. Præcipe for appearance of Cole & Hartswick for defendants and waiver of service of Summons filed.

Oct. 9, 1914. Præcipe for appearance of Sterrett and Acheson for plaintiff filed.

Feb. 23, 1915. Plaintiff's Statement filed.

5 Feb. 24, 1915. Rule to plead filed.

Mar. 2, 1915. Plea filed.

Mar. 8, 1915. Præcipe for issue filed.

May 25, 1915. Præcipe for appearance of L. D. McCall for Plaintiff filed.

Jun. 2, 1915. Jury called and sworn.

Jun. 2, 1915. Plaintiff's witnesses sworn: Vernon W. Pancoast, Dr. J. C. Sullivan, Mrs. V. W. Pancoast, Morris Skinner, C. W. Johnson, H. W. Johnson, J. F. Sobel, C. D. Oldine, Dr. C. B. Schildecker, A. T. Robinson, and May Hickman.

Jun. 2, 1915. Amendment to Plaintiff's Statement and order granting leave to discontinue as to two of the defendants, filed and entered.

Jun. 3, 1915. Trial proceeds.

Jun. 3, 1915. Motion for compulsory non-suit granted.

Jun. 7, 1915. Motion to take off non-suit filed by leave of Court.

Jul. 9, 1915. Motion to take off non-suit argued C. A. V.

Sept. 4, 1915. Order entered on Argument List "And now, Sept. 4, 1915, Motion sustained and new trial granted.

PER CURIAM."

Oct. 7, 1915. Præcipe for trial list filed.

Nov. 17, 1915. Amendment to Plaintiff's Statement filed by leave of Court.

6 Nov. 17, 1915. Suggestion of Death, Motion to amend record, and order filed and entered.

Dec. 7, 1915. Jury sworn.

Dec. 7, 1915. Plaintiff's witnesses sworn: Alex P. Reed, M. O. Skinner, L. T. Taylor and Dr. Morris.

Dec. 8, 1915. Trial proceeds. Motion for compulsory non-suit refused and filed.

Dec. 8, 1916. Plaintiff's witnesses sworn: Dr. C. B. Schidlecker, J. F. Sober, C. D. Knoldo, F. E. Brein, F. H. Pancoast and Mrs. C. Pancoast.

Dec. 9, 1915. Trial proceeds.

Dec. 9, 1915. Defendant's witnesses sworn: T. W. Johnston, H. B. Johnston, Vernon Johnston, Austin Blakeslee, Irvin Blakeslee, Coulson Blakeslee, J. H. Crissman, Wm. Ross and F. W. Hetfield.

Dec. 10, 1915. Trial proceeds.

Dec. 11, 1915. The jury having failed to agree upon a verdict are discharged by the Court.

Dec. 11, 1916. Jury List filed.

Dec. 23, 1916. Præcipe for trial list filed.

Apr. 26, 1916. Objection by defendant to motion of Plaintiff to file amended Statement, filed and entered.

Apr. 27, 1916. Plaintiff's Amended Statement filed by leave of Court.

Apr. 27, 1916. Exception noted to defendant to allowance of filing of Amended Statement said exception noted on defendant's objections.

7 May 5, 1916. Affidavit of Defense filed.

May 31, 1916. Doctor's Certificate filed.

May 31, 1916. Jury sworn.

May 31, 1916. Plaintiff's witnesses sworn: A. P. Reed, Lloyd T. Taylor, Frank Brenon, C. D. Oldknold, J. S. Sober, T. H. Pancoast, Dr. J. C. Sulvan, Dr. Schildecker, Dr. E. K. Morris, Mrs. Clair Pancoast, Austin Blakeslee, M. O. Skinner, Elmer Segers, W. H. Sober, F. W. Hitfield, and T. H. Pancoast.

June 1, 1916. Trial proceeds.

June 1, 1916. Motion for compulsory non-suit filed.

June 1, 1916. Defendant's witnesses sworn: Coulson Blakeslee, T. W. Johnston, H. B. Johnston, O. Atwood, Irvin Blakeslee, and Austin Blakeslee.

June 1, 1916. Defendant's Points filed.

June 2, 1916. Verdict for Plaintiff in sum of \$8,000.00 filed and entered.

June 2, 1916. Jury list filed.

June 5, 1916. Motion for new trial filed by leave of Court.

Jul-14, 1916. Motion to continue time for filing bill of exceptions presented and orders permitting same granted and filed.

Aug. 8, 1916. Opinion refusing motion for new trial filed and entered.

Aug. 8, 1916. Pursuant to the foregoing action of the Court in refusing the Motion for a new trial, judgment is hereby entered upon the verdict in favor of the plaintiff and against the defendant, Dubois Electric Company, in the sum of Eight  
8 Thousand Dollars, (\$8,000.00).

J. WOOD,  
Clerk.

Sept. 11, 1916. Summary of Plaintiff's witness bills filed.

Sept. 15, 1916. Exceptions to bill of costs filed, with endorsement thereon as follows: "The plaintiff's bill of costs has been duly filed and formal taxation thereof is to await disposition of defendant's appeal to the Circuit Court (of appeals); the bond filed by defendant on appeals, however, to secure payment of costs as well as judgment. Sept. 15th, Sterrett and Acheson, Att'ys of Pl'tff. Al. L. Cole, Att'y for Def't."

Sept. 15, 1916. Petition for writ of error and order allowing same filed and entered.

Sept. 15, 1916. Assignments of Error filed.

Sept. 15, 1916. Transcript of Testimony certified by the Court and made a part of the record, and filed.

Sept. 15, 1916. Bill of Exceptions signed, sealed and filed.

Sept. 15, 1916. Citation awarded, issued and service accepted for Pl'tff by Sterrett & Acheson, Attorneys.

Sept. 15, 1916. Writ of Error issued.

Oct. 3, 1916. Bond on appeal approved and filed.

Oct. 3, 1916. Bond approved and filed.

9 Feb. 13, 1917. Mandate from U. S. Circuit Court of Appeals reversing the judgment of this Court, with costs, and awarding a new Jury trial, received and filed.

June 4, 1917. Jury sworn.

June 5, 1917. Trial proceeds.

June 6, 1917. Trial proceeds.

June 7, 1917. Trial proceeds.

June, 1917. Pl'tff's witnesses sworn: M. O. Skinner, C. D. Oldknow, Lloyd T. Taylor, Frank E. Breon, Chas. B. Hammer, John F. Sobers, W. H. Sobers, Clara N. Pancoast, Rev. J. D. Bell, L. B. Simmons, W. H. Watt, H. G. Dormire and Claude Miles.

June, 1917. Defendant's witnesses sworn: Irvin Blakesley, Coulson Blakesley, Torrence W. Johnston, H. B. Johnston, Harry V. Johnston, Austin Blakesley, R. B. Blakesley, J. M. Grismer, A. L. Steafe, James A. Hall, W. F. Weber, Thos. L. Kearns, Wm. Wingert, T. W. Munro, Alfred Johnson and W. H. Albert.

June 8, 1917. Verdict for plaintiff in the sum of \$9,400.00 filed and entered.

June 8, 1917. Jury list filed.

June 8, 1917. Motion in Arrest of Judgment and for New Trial filed by leave of Court.

Oct. 26, 1917. Motion argued C. A. V.

Jan. 18, 1918. Opinion refusing motion for a new trial filed and entered.

9½ Jan. 18, 1918. Judgment is hereby entered on the verdict in favor of the plaintiff and against the defendant, Dubois Electric Company, in the sum of Nine Thousand Four Hundred and no/100 (\$9,400.00) Dollars.

J. WOOD CLARK,  
Clerk.

Feb. 25, 1918. Petition for Writ of Error and Order allowing same filed and entered.

Feb. 25, 1918. Assignments of Error filed.

Feb. 25, 1918. Transcript of Testimony certified as a part of the record and filed.

Feb. 25, 1918. Bill of Exceptions signed, sealed and filed.

Feb. 25, 1918. Notice of contents of record on appeal, filed.

Feb. 25, 1918. Bond sur Writ of Error approved and filed.

Mar. 4, 1918. Writ of Error allowed and issued.

Mar. 4, 1918. Citation awarded and issued.

Mar. 5, 1918. Citation service accepted by Sterrett & Acheson.

In the District Court of the United States for the Western  
District of Pennsylvania.

VERNON W. PANCOAST

VS.

THE DUBOIS ELECTRIC COMPANY, a Corporation; THE DEPOSIT  
NATIONAL BANK, a Corporation, and JOSEPH BENSINGER.

*Præcipe for Summons.*

Issue summons in trespass. Returnable sec. leg. Damages,  
\$0,000.

VERNON W. PANCOAST.

To William T. Lindsay, Clerk of said Court.

*Plea.*

Filed March 2, 1915.

Now, March 2nd, 1915, defendants in the above entitled case plead  
not guilty.

COLE & HARTSWICK,  
*Attorneys for Defendant.*

*Verdict.*

We find in favor of the plaintiff in the sum of (\$9,400) Nine  
Thousand Four Hundred Dollars.

SAMUEL H. HARRIS,  
*Foreman.*

JOHN C. STEWART.

ANDREW GLOVER.

GEO. C. ROHLAND.

A. W. COTTOM.

J. K. BROWN.

M. H. LENHART.

JOSEPH GRAY.

GEO. E. LIGHTCAP.

A. R. LONG.

J. CALVIN BORTZ.

G. M. WYKOFF.

*Judgment.*

June 18th, 1918, pursuant to the foregoing action of Court in  
granting the motion for a new trial, judgment is entered upon the  
verdict in favor of the plainad against the defendant, Dubois Electric

Company, in the sum of Nine Thousand Four Hundred (\$9,400) Dollars with interest from June 8, 1917.

J. WOOD CLARK,  
Clerk.

12

*Defendant's Points.*

The Court is respectfully requested to charge the Jury on behalf of Defendant as follows:

First. If the defendant is liable to the plaintiff it must be on account of the negligent performance of some duty that the defendant owed to the plaintiff, or the negligent omission on behalf of the defendant to do something that it was under legal obligation towards the plaintiff to do.

Affirmed.

Second. The fact that some other person or party may or may not be liable to the plaintiff is entirely immaterial and adds nothing to the liability of the defendant.

Affirmed.

Third. All the testimony shows that the defendant erected the banner in question as the employee of M. O. Skinner, and at his instance and request and was under no contract obligation with Skinner to keep and at all times maintain said banner in a safe condition, therefore, the defendant would not be liable to the plaintiff for the fall of said banner, inasmuch as said banner did not fall until several days after it had been erected by the defendant company, and its contract with Skinner had been entirely performed and completed.

The other points are refused.

13 Fourth. The contract for the erection of the said banner having been made with Skinner, and being only for the erection of the banner, or at most erect and take it down, and the plaintiff not being a party thereto in any way, cannot recover from the defendant for its faulty or negligent performance of the contract with Skinner, even if such contract were faulty and negligently performed by the defendant.

The other points are refused.

Fifth. As it appears by all the testimony in this case that the banner in question was erected by the defendant for and at the instance of M. O. Skinner, and that the erection was complete, and the defendant was not in possession, charge or control of the banner at the time it fell, there is no such connection between the faulty and negligent erection of the banner, if such existed, and the happening of the accident as to make the defendant liable to the plaintiff for the injury received, and the verdict must be for the defendant.

The other points are refused.



Sixth. Under the eleventh paragraph of the plaintiff's statement of claim in this case, which purports to set out the wrongful act which caused the injury to the plaintiff, and under the evidence that the defendant was not in possession of the banner at the time it fell the plaintiff cannot recover and the verdict must be for the defendant.

The other points are refused.

Seventh. Under all of the testimony in the case the defendant company was simply an employee of Skinner engaged to erect the banner in question for a compensation according to the services rendered, and that it had no other or further connection with said banner, that it did not fall while in the possession or control of the defendant, nor while in process of erection; therefore, there was no such relation, contractual or otherwise, between the plaintiff and the defendant as to enable Pancoast or his representative to recover for the faulty or negligent erection of the banner, even if it were so erected, and your verdict must be for the defendant.

The other points are refused.

Eighth. The mere fact that Vernon W. Pancoast was injured on October 12, 1912, by the falling of this banner, or by the falling of the bricks in the flue to which said banner was attached, will not make the defendant liable in this case. The testimony shows that on the day of the accident the defendant owed no duty to the plaintiff and that the defendant had not negligently omitted to do something on behalf of the defendant which the defendant was under legal obligations towards the plaintiff to do. Therefore, the plaintiff cannot recover in this action, and your verdict must be for the defendant.

The other points are refused.

Ninth. Under the Law, the Pleadings and the Evidence the plaintiff is not entitled to recover and a verdict must be for the defendant.

The other points are refused.



- 15 In the District Court of the United States for the Western District of Pennsylvania, October Term, 1914.

No. 1234.

FIDELITY TITLE & TRUST COMPANY, Ancillary Administrator of the Estate of Vernon W. Pancoast, Deceased,

vs.

DUBOIS ELECTRIC COMPANY.

*Bill of Exceptions.*

Filed February 25, 1918.

Be it remembered, that to October Term, 1914, Vernon W. Pancoast impleaded the Dubois Electric Company, the Deposit National Bank and Joseph Bensinger, as defendants, in a certain case in this court to No. 1234, in an action of trespass, and on October 6, 1914, filed his præcipe for summons in trespass, and on February 23, 1915, filed his declaration therein as follows:

- 16 In the District Court of the United States for the Western District of Pennsylvania, October Term, 1914.

No. 1234.

FIDELITY TITLE & TRUST COMPANY, Ancillary Administrator of the Estate of Vernon W. Pancoast, Deceased,

vs.

DUBOIS ELECTRIC COMPANY.

*Plaintiff's Original Statement.*

Vernon W. Pancoast, plaintiff above named, claims and demands of the Dubois Electric Company, the Deposit National Bank, and Joseph Bensinger, defendants above named, the sum of \$30,000, upon a cause of action, whereof the following is a statement:

The said plaintiff, Vernon W. Pancoast, is, and at all times hereinafter mentioned, was a citizen of the State of New York.

- 17 The said defendant, the Dubois Electric Company, is and at all times hereinafter mentioned, was a corporation organized and existing under the Laws of the State of Pennsylvania, and a citizen of the State of Pennsylvania and resident in the Western District thereof.

The said defendant, The Deposit National Bank, is, and at all times hereinafter mentioned was, a national banking association, organized and existing under the Laws of the United States, and a citizen of

the State of Pennsylvania and resident in the Western District thereof.

The said defendant, Joseph Bensinger, is, and at all time herein-after mentioned, was a citizen of the State of Pennsylvania, and a resident of the Western District thereof.

The amount in controversy in this suit, exclusive, of interest and costs, exceeds the sum of \$3,000.

On or shortly prior to October 12, 1912, the said The Deposit National Bank, through its duly authorized officers, agents and employees, and the said Joseph Bensinger, caused or permitted the said Dubois Electric Company to construct, erect or stretch across Long avenue, Dubois, Pa., between the banking building, owned by said bank, and the hotel building, owned by said Bensinger, a sign or banner about 25 feet in breadth and from 16 feet to 20 feet in height, made of steel cable and rope mesh, upon which was spread out and fastened thereto a cloth fabric containing a political display or advertisement.

18 The said Dubois Electric Company, its agents or employees, in constructing, erecting or stretching said sign or banner across Long avenue, negligently and carelessly used as an anchor, to which to fasten the one end of said sign or banner, a brick chimney standing near the edge of that part of the roof of said hotel building which overhangs Long avenue and which fastening was effected by making two turns around said chimney with cable by which said sign or banner was suspended and forming a loop in said cable by clapping the end thereof to the body of it.

On October 12, 1912, the stress or strain of said sign or banner thus fastened to the brick chimney, on the roof of said hotel building, caused the said chimney to pull over and a number of the bricks from said chimney fell from the roof of said hotel building to the street below, the said Long avenue, and struck the said Vernon W. Pancoast, a pedestrian on said street, on his head and other parts of his body, thereby inflicting grievous bodily injury on said Vernon W. Pancoast to the extent as hereinafter set forth.

The falling of the bricks which caused the bodily injury to the said Vernon W. Pancoast, as hereinabove stated, was due to the negligence of the said defendant their agents or employees in their use of the said chimney as an anchor for said sign or banner, as hereinbefore set forth.

The bodily injury sustained by said Vernon W. Pancoast from said falling bricks consisted of a compound comminuted fracture of the skull, a fracture or contusion of the right arm and shoulder, and a fracture of the bones of one foot. The said injury to said

19 Vernon W. Pancoast's skull caused him to lose considerable brain substance to the permanent injury of his brain, and further it necessitated the removal of a considerable portion of his skull by reason of which the said Vernon W. Pancoast's life is constantly in extreme peril or jeopardy on account of the fatal effect which a very slight injury to his head would now probably produce. The said injury to said Vernon W. Pancoast's brain has seriously impaired his thinking and reasoning powers and his power of speech,

and has produced a paralysis of his right arm and hand and right side generally, which to a great extent incapacitates and inconveniences him in the performance of the ordinary functions of life.

In order to relieve his said injured condition as much as possible, the said Vernon W. Pancoast has expended large sums of money in the payment of hospital bills, medical and surgical attention, nurses services and other necessary expenses, said expenditures amounting at the present time to upward of \$1,000.

At the time he received his said injuries, said Vernon W. Pancoast was forty-three (43) years old, in good physical condition and with a reasonable expectation of a long life before him. He was then, and for a long time had been a man of large business capacity and interests, particularly in the manufacture of glassware, and by reason of his well known ability to conduct and carry on successfully a large glass manufacturing business, his earning power at the time of receiving said injuries was great. The injuries which he received, as hereinabove stated, have rendered the said Vernon W. Pancoast

totally unfit for the conducting of any business by altogether  
20 destroying his capacity therefor. By reason of which fact the said Vernon W. Pancoast's large earning power at and prior to the time that he received his said injuries has been totally destroyed, to his great pecuniary loss and damage.

Furthermore, on account of his said injuries, the said Vernon W. Pancoast has suffered great pain and anguish and will thereby continue to suffer great pain and anguish for the rest of his life.

Wherefore, by reason of the wrongs done the said Vernon W. Pancoast, plaintiff within named, by said defendants, as hereinbefore set forth, the said plaintiff hereby claims and demands of said defendants as damages therefor the sum of \$30,000.

(Signed)

STERRETT & ACHESON,  
*Attorneys for Plaintiff.*

and the defendant pleaded not guilty, and thereupon issue was joined between the said parties; and that subsequently, to wit: June 2, 1915, by leave of Court, said case was discontinued as to all the defendants save the Dubois Electric Company and the plaintiff's statement was amended accordingly; and still subsequently the plaintiff died, and, his death having been duly suggested, the Fidelity Title & Trust Company, Ancillary Administrator of his estate, was duly substituted as plaintiff on November 17th, 1915.

And afterwards, to wit: April 27th, 1916, against the objections and exceptions of the defendant, the plaintiff was allowed to file the following amended statement or declaration:

The Fidelity Title & Trust Company, Ancillary Administrator of the estate of Vernon W. Pancoast, deceased, plaintiff above named, claims and demands of the Dubois Electric Company, defendant

above named, the sum of \$50,000, upon a cause of action whereof the following is a statement.

1. The above action was instituted by the said Vernon W. Pancoast in his lifetime, to recover of the defendant damages due to an injury inflicted on him through the negligence of the said Dubois Electric Company, as hereinafter set forth.

2. The said Vernon W. Pancoast was at the time of bringing this suit, and at all times herein mentioned, a citizen of the State of New York.

3. The said Dubois Electric Company is, and at all times herein mentioned, was a corporation organized and existing under the Laws of the State of Pennsylvania, and a citizen of the State of Pennsylvania and a resident of the Western District thereof.

4. The amount in controversy in this suit, exclusive of interest and costs, exceeds the sum of \$3,000.

22 5. The said Vernon W. Pancoast died on August 7, 1915, and after his death Letters of Administration on his estate were granted by the Surrogate of Cattaraugus county, New York, to Clara N. Pancoast, and thereafter the said Fidelity Title & Trust Company of Pittsburgh, took out Ancillary Letters of Administration on the estate of said Vernon W. Pancoast, for the purpose of continuing the above action, and thereafter, to wit: On or about November 7, 1915, the said Fidelity Title & Trust Company was, upon order of this Honorable Court, duly substituted as plaintiff, for the purpose of continuing the above action, and the record therein accordingly amended, and the said Fidelity Title & Trust Company now makes the within amended statement of claim.

6. On or about October 7, 1912, the said Dubois Electric Company, acting through its officers, agents, or employees, constructed, erected, suspended and maintained across Long avenue, Dubois, Pennsylvania, between the buildings of the Deposit National Bank, on the one side of said street, and the Commercial Hotel building, on the other side of the street, a sign or banner about twenty-five (25) feet in width and from sixteen (16) to twenty (20) feet in depth.

7. The said sign or banner was made of rope mesh or netting, upon which there was spread out and fastened thereto a large cloth fabric, containing a painted political display or advertisement. The display or advertisement was designed for quite temporary use, as it contained the names and portraits of a candidate for each the office of President and Vice President of the United States to be voted for at the general election on November 5th, following.

23 8. The said sign or banner was suspended by means of a steel cable, to which it was attached, the one end of which cable was fastened to the said Bank building and the other end to said hotel building. The lower corners of said sign or banner were fastened by ropes, likewise one to said bank building and the other to said hotel building. At the point on Long avenue at which said

sign or banner was suspended, said street was forty (40) feet wide from curb to curb, or about sixty (60) feet from building to building. The effect of fastening the said sign or banner by its four corners was to give it the character of a sail, and, exclusive of the steel cable, to which it was attached, it weighed about forty (40) pounds.

9. In constructing, erecting, suspending and maintaining the said sign or banner across Long avenue, the said Dubois Electric Company, acting through its officers, agents or employees, negligently and carelessly used, as an anchor for fastening the one end of the steel cable to which said sign or banner was attached, a brick chimney standing near the edge of that part of the roof of said hotel building which overhangs Long Avenue. The fastening of the said sign or banner to said chimney rendered said chimney unsafe and insecure, and the negligent and careless manner in which the Dubois Electric Company, through its officers, agents or employees, made said fastening, rendered said chimney all the more unsafe and insecure.

10. On or about October 12, 1912, and while the said sign or banner as thus constructed, erected, suspended and maintained,  
24 was under the control and supervision of said Dubois Electric Company, the stress or strain of said sign or banner on said chimney caused a part of said chimney to pull from off the roof of said hotel building, and in falling to the street below, some of the bricks from the chimney thus pulled down by said sign or banner, struck the said Vernon W. Pancoast, a pedestrian on said street, on his head and other parts of his body thereby inflicting grievous bodily injuries on said Vernon W. Pancoast to the extent as herein-after set forth.

11. The falling of the bricks from said chimney which caused the bodily injuries to said Vernon W. Pancoast, as hereinbefore stated, was due to the negligence of the Dubois Electric Company, its officers, agents or employees, in the use of said chimney, as a fastening for said sign or banner as hereinabove set forth.

12. The bodily injuries sustained by the said Vernon W. Pancoast, through being struck by said falling bricks, consisted of a compound comminuted fracture of the skull, a fracture or contusion of the right arm and shoulder, and a fracture of the bones of one foot. The aforesaid injury to the said Vernon W. Pancoast's skull, necessitated the removal of a considerable portion of his skull, by reason of which the said Vernon W. Pancoast's life was constantly in extreme peril or jeopardy, on account of the fatal effect which a very slight injury to his head would have probably produced. The said skull injury and the necessary removal of a portion thereof caused said Vernon W. Pancoast to lose a considerable quantity of brain substance, to the permanent injury of his brain. The injury to  
25 said Vernon W. Pancoast's brain seriously impaired his thinking and reasoning powers, and produced a partial paralysis of his stomach, kidneys and bladder and a paralysis of his

tongue, right arm and hand, and right side generally and impaired his power of speech, totally unfitting him for following his business as a glass manufacturer, or any other business, and greatly incapacitating and inconveniencing him in the performance of the ordinary functions of life.

13. In order to relieve himself as much as possible from his physical and mental condition due to his said injuries, the said Vernon W. Pancoast expended large sums of money in the payment of hospital bills, bills for medical and surgical attention, nurses' services, and other necessary expenses, amounting to upwards of \$2,000.00.

14. At the time he received the injuries above mentioned the said Vernon W. Pancoast was forty-three years old, in good physical condition, and with a reasonable expectation of a long life before him. He was then, and for a long time had been, a man of large business capacity and interests, particularly in the manufacture of glassware. and by reason of his well known ability to conduct and carry on successfully a large glass manufacturing business, his earning power, at the time of his receiving said injuries was great. The injuries which he received, as hereinabove stated, rendered the said Vernon W. Pancoast totally unfit for conducting the glass manufacturing business or any other business, by altogether destroying his capacity therefor. By reason of this fact, the said Vernon W. Pancoast's large earning power at and prior to the time he received said injuries, was totally destroyed, to his great pecuniary loss and damage. Furthermore, by reason of said injuries the said Vernon W. Pancoast endured great physical pain and suffering, and by reason of said injuries continued to endure great physical pain and suffering for the remainder of his life.

15. Wherefore, by reason of the wrongs done the said Vernon W. Pancoast by the said Dubois Electric Company, as hereinbefore set forth, on account of which the said Vernon W. Pancoast instituted this action in his lifetime, the said Fidelity Title & Trust Company, Ancillary Administrator of the estate of Vernon W. Pancoast, deceased, hereby claims and demands of the said Dubois Electric Company, as damages for the said wrongs done the said Vernon W. Pancoast, the sum of \$50,000.

STERRETT & ACHESON,  
*Attorneys for Plaintiff.*

COUNTY OF ALLEGHENY,  
*State of Pennsylvania, ss:*

Before me, the undersigned authority, personally appeared Alex P. Reedy, who, being duly sworn, according to law, deposes and says that he is assistant trust officer of the Fidelity Title & Trust Company, Ancillary Administrator of the estate of Vernon W. Pancoast, deceased, plaintiff within named, and that the facts set forth in the foregoing amended statement are true and correct, to the best of his knowledge, information and belief.

ALEX P. REEDY.



Sworn to and subscribed before me this 24th day of April A. D. 1916.

[SEAL.]

MARY M. HEDDEN,  
*Notary Public.*

My commission expires January 19, 1919.

To the Within Defendant:

You are required to file an affidavit of defense to this statement within fifteen days from the service hereof.

STERRETT & ACHESON,  
*Attorneys for Plaintiff.*

And now, to wit: April 27, 1916, on motion of Sterrett & Acheson, attorneys for Plaintiff, within amended statement of claim is hereby allowed and ordered to file.

PER CURIAM.

To which action of Court the defendant on April 27th, 1916, excepted which exception was duly allowed by the Court; and the defendant now prays that a bill of exceptions be sealed to the action of the Court in allowing plaintiff's amended statement.

And to the plaintiff's amended statement the defendant filed the following affidavit of defense:

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*Affidavit of Defense.*

Filed May 5th, 1916.

CLEARFIELD COUNTY, ss:

Austin Blakeslee being duly sworn says that he is president of the defendant company and is familiar with its business and that said company has the following defense to the plaintiff's claim in this case:

It is denied on or about October 7th, 1912, the Dubois Electric Company constructed, erected, suspended and maintained across Long avenue, at Dubois, Pennsylvania, between the building of the Deposit National Bank on the one side and the Commercial Hotel building on the other side, a sign or banner about twenty-five feet in width and from sixteen to twenty feet in depth.

It is true that the defendant by its servants, suspended a banner across Long Avenue, but at the time of the grievances complained of in this suit the defendant's connections with said banner had wholly ceased, and it did not maintain in the same nor was it under any obligations to maintain the same.

It is further denied that the defendants by its officers, agents, or employees negligently suspended said banner, but it is averred that when said banner was suspended by the defendants it was properly, prudently and carefully anchored to the base of a standing chimney, which was protected by a sheet iron or tin flashing, and that while so fastened it was perfectly safe and could not nor did not become loose or fall, neither did said fasten-

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ing render said chimney unsafe or unsecure as suspended and fastened by the defendant, and it is denied that there was any negligence or carelessness in the suspension of said banner by the defendant.

It is denied that on or about October 12th, 1912, and while the said sign or banner as thus constructed, erected, suspended and maintained that it, the said banner, was under the control and supervision of the defendant or that it was in any way bound or obligated to maintain and supervise the same and that this defendant is unable to state how or in what manner either the banner or the chimney fell, but it denies that it was by reason of its negligence or carelessness.

It is further denied that Vernon W. Pancoast received any injury which was due to the negligence of the defendant or its officials or employees in any manner whatever.

The other matters and things averred in the plaintiff's statement are not within the knowledge of the defendant and it is unable to either deny or admit the same, but expressly refuses to admit the same and if material the plaintiff will be held to strict and full proof thereof.

AUSTIN BLAKESLEE.

Sworn and subscribed before me this — day of May, 1916.

[SEAL.]

JOHN C. ARNOLD,

U. S. Commissioner.

Commission expires October, 1916.

And afterwards, to-wit; at the Session of said Court, held in the City of Pittsburgh, the Honorable W. H. Seward Thomson, Judge of said court, then and there presiding, on June 4th, 1917, the aforesaid issue between the said parties came to be tried by the said Court and a jury for that purpose duly impaneled, at which time came as well the said plaintiff as the defendant by their respective attorneys, and the jurors or the jury aforesaid impaneled to try the said issue, being called came and were then and there in due manner chosen and sworn, or affirmed, to try the said issue; and upon the trial witnesses were called and testified, both on the part of the plaintiff and the defendant, and certain documentary evidence was offered, and the said testimony offered and admitted on the trial before said jury, both oral and documentary was as follows, to-wit:



- 31 In the District Court of the United States for the Western District of Pennsylvania, October Term, 1914.

No. 1234.

FIDELITY TITLE & TRUST COMPANY, Administrator of the Estate of Vernon W. Pantoast, Deceased.

VS.

DUBOIS ELECTRIC COMPANY.

And now, Monday, June 4th, 1917, the above entitled case came on to be tried before Hon. W. H. S. Thomson, J., and a Jury, at Pittsburgh, Pennsylvania.

Appearances:

For Plaintiff: C. A. Jones, Esq. (of Sterrett & Acheson).

For Defendant: W. C. Miller, Esq.

- 32 *Transcript of Official Notes of Testimony.*

Reported by M. Gangwisch.

Jury sworn.

Case opened to the Jury by Mr. Jones.

Mr. Jones: I desire to read from the record of the former trial of this case, the testimony of A. P. Reed, who is the assistant trust officer of the Fidelity Title & Trust Company. It is purely a formal matter as to the substitution of the Administrator.

Testimony of A. P. Reed was read to the jury as follows:

A. P. REED, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. Have you any official connection with the Fidelity Title & Trust Company of Pittsburgh.

A. I am the assistant trust officer of the Fidelity Title & Trust Company.

33 Q. Will you state whether or not the Fidelity Title & Trust Company of Pittsburgh took out letters of administration ancillary, on the estate of Vernon W. Pantoast?

A. They have taken out ancillary letters upon the estate of Vernon W. Pantoast.

Q. Do you have those letters with you?

A. I have.

Q. I show you Plaintiff Exhibition No. 1, and ask you what that is.

A. Certificate of the appointment of the Fidelity Title & Trust Company of Pittsburgh as administrator of Vernon W. Pancoast, late of Olean.

Q. Has the Fidelity Title & Trust Company acted as ancillary Administrator of Vernon W. Pancoast?

A. It has.

Q. What property has the decedent in this State, so far as the Fidelity Title & Trust Company knows?

A. No other property than what might be recovered in this action.

Q. What was the purpose of your taking out letters of administration?

A. For the purpose of continuing the present action.

By Mr. Jones: I offer in evidence Exhibit No. 1, being letters of administration.

(No cross-examination.)

It is admitted by counsel for the defendant that Mr. Pancoast at the time of the accident and at the time of the bringing of  
34 this action, was a citizen and resident of the State of New York.

It is further admitted that the Dubois Electric Company, the defendant, is a corporation organized and existing under the laws of the State of Pennsylvania, and having its principal place of business in Dubois, Pennsylvania, and that it is a resident of the Western District of Pennsylvania.

35 *Testimony of M. O. Skinner.*

M. O. SKINNER, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. Where do you live?

A. Dubois, Pennsylvania.

Q. What is your business?

A. Contractor.

Q. How long have you lived in Dubois?

A. For about twenty years.

Q. Did you have anything to do with regard to procuring the services of the Dubois Electric Company in 1912, with respect to the erection, suspension and maintenance of a political banner across Long avenue, in Dubois?

By Mr. Miller: I object to the form of the question, as suggestive and leading in the form in which it is asked by Counsel, as it suggests to the witness that the defendant was employed to erect, suspend and maintain the banner.

(Question withdrawn.)

36 By Mr. Jones.

Q. Did you have anything to do with a political banner in Dubois in 1912?

A. I had.

Q. Will you just tell the Court and jury what you had to do with it?

A. In 1912, at the suggestion of some other men, who solicited money to buy a banner, a Taft and Sherman banner. When we received the banner it came in by express, and we took it to the Acorn Club rooms—

Q. Is this the banner?

A. I believe so, yes, sir.

Q. You took it to the Acorn Club?

A. Yes. We opened the banner and examined it. I went to the Dubois Electric Company and asked them to put the banner up for me, and when the election was over to take it down, telling them I wanted nothing to do with it. I wanted them to attend to it. I didn't want to go on the roof. After some little discussion, two of the employees of the Electric Company went with me to the club rooms and secured the banner, and brought it down.

A. Yes.

Q. Who were those employees of the Electric Company?

A. I believe it was Terrence Johnston, and I am not certain about the other fellow. I think his name was Dowd.

Q. What were you to pay for this service?

A. There was nothing said in regard to the amount of the bill.

Q. When did you first know what they would charge for this service?

A. When I received my bill.

37 Q. I show you paper marked "Plaintiff's Exhibit No. 2," and ask you what that is?

A. That is the bill of the work in the erection of the banner.

Q. What all does that bill include?

By Mr. Miller: Objected to as the bill itself is the best evidence of what it includes.

By the Court: That would be true for whatever it sets forth on its face. It might be explained if there is something omitted.

By Mr. Jones:

Q. I will ask you then, is there anything on the bill other than for the services they performed in regard to the banner and the st-ing of lights across the street?

A. Yes, sir.

Q. What is that item?

A. An item concerning the wiring of the vault.

Q. Did that have anything to do with this work at all?

A. No, sir.

Q. That was another matter?

A. That was another matter.

Q. Where was that vault?

A. The Osborne Machine Company, of Dubois.

Q. Is that the item marked "Osborne"?

A. Yes, sir.

38 Q. That last item on the bill?

A. Yes, sir.

Q. Do the remaining items have to do with the charges for services of the Electric Company with respect to the banner and the lighting?

A. Yes, sir.

Q. Did you pay that bill?

A. Yes, sir.

Q. When did you receive that bill, do you know?

A. I couldn't tell at present.

Q. What is the date of the bill?

A. November 21, 1912.

Q. Were you ever on the roof of the hotel building?

A. No, sir.

Q. Were you to go on the roof of the hotel building?

A. No, sir.

Q. Was there anything said in your dealings with the Electric Company for the hanging of this banner, about your control of it?

A. No, sir.

Q. Were you to have control over it?

A. No, sir.

Q. What was their charge for services to include?

By Mr. Miller: I object to the form of the question.

By the Court: It might be sort of a conclusion. Anything that was said with reference to it, or any arrangement made, any conversation about it.

39 By Mr. Jones:

Q. What items were you expected to pay for?

By Mr. Miller: Objected to as not being in proper form.

By Mr. Jones:

Q. What did you tell them at the time of your employment of them, that they were to do with respect to the banner, for which you could be expected to pay them?

By Mr. Miller: Objected to, as the proper question is, what was the conversation between them, what was the contract?

By the Court: Yes.

By Mr. Jones:

Q. State it that way.

A. Just as I stated before, I went to the Electric Company and asked them to put up the banner and take it down after the election, stating to them that I didn't want to have anything to do with it; I wouldn't go on the roof, and wanted them to attend to it. That was my statement at the time.

Q. Did you pay every bill that was submitted to you by them for the services in connection with the banner?

A. Yes, sir.

40 Q. Do you owe them anything at the present time for the services?

A. No, sir.

Q. Did you give them anything with which to suspend this banner?

A. We had a rope that came with the banner, a wire rope, and we furnished iron cleats to be screwed to the buildings on either side of the street, and the banner was to be fastened to those cleats.

Q. What was the nature of those cleats?

A. The ones furnished were strap hinges, large eyes, sufficiently large to fasten into it.

Q. Did you give it to the employes of the company when they got the banner?

A. Yes, sir.

Q. Did they report to you at any time about the erection of the banner?

A. After the banner had been up, I think the first night, it came down. The next day they replaced it and that evening they reported to me that they had restrung the banner with a wire cable, fastening it around the flashing of the chimney on the roof.

Q. Did they ever report to you that they had fastened it to the cleats?

By Mr. Miller: Objected to as immaterial and irrelevant.

By the Court: I think you can show what the facts were. The objection is overruled and exception noted to defendant.

A. No, sir, they did not.

41 By Mr. Jones:

Q. I understood you to say that the first report was made to you after they had fastened it to the chimney.

A. Yes, sir.

Q. And that the banner had already come down from the first fastening, wherever that may have been?

A. That was the report, that the banner had come down.

Q. Did you know that yourself?

A. No, sir.

Q. Did you direct them to go up there and fasten it to the chimney?

A. No, sir.

Q. Did you have any conversation with them between the time that they received the banner from you, and the cleats, and the time that they fastened it to the chimney?

A. No, sir.

Q. Do you know what time that was, what time of the year?

A. The time I delivered the banner?

Q. Yes?

A. About the 5th of October, 1912, I believe.

Q. Did you know anything about the chimney being pulled off the roof of the Commercial Hotel building in October of that year?

A. Yes, I heard of it.

Q. Did you make any arrangement with the Commercial Hotel, or the Deposit National Bank on the opposite side of the street, as to the fastening of this banner between those buildings?

A. No, sir; I did not.

42 Q. Did you see any one about that?

A. No, sir.

Q. Who obtained that permission?

By Mr. Miller: If you know.

By Mr. Jones:

Q. Yes, if you know.

A. I do not.

Q. Did you have anything to do with regard to the fastening of the banner to the hotel at all?

A. No, sir.

Q. Other than you have testified to heretofore?

A. No, sir.

Q. Were you in Dubois the day the chimney came down?

A. Yes, sir.

Q. Did you see it after it had come down?

A. The evening after it came down I walked past there.

Q. When did you first know of it?

A. When I was on my way home from work, about half past five, a party met me on the street and told me the banner had blown down and pulled *the* down the chimney.

Q. Had you had any conversation with any of the employes of the Dubois Electric Company, or any one of the Dubois Electric Company, respecting this banner, between the time that Johnston told you that he had fastened it to the chimney and the day of the accident?

A. We had lights strung up to illuminate the banner.

43 Q. When did they put those lights up?

By Mr. Miller: What is the purpose of that?

By Mr. Jones: The purpose is to show in part the defendant's position and ability to exercise supervision and control—exercise supervision over the negligent structure which they had created.

By Mr. Miller: Objected to because it does not say the supervision

of the defendant; and, second, because it is incompetent, irrelevant and immaterial to affect the issue in this case.

By the Court: I will allow the facts to be shown in connection with the banner, and what was done, the legal effect of those facts being a matter for later consideration. The objection is overruled and an exception noted to defendant.

(Question read.)

A. I couldn't at this time say just when they did put the lights up.

By Mr. Jones:

Q. Did you have any conversation with H. B. Johnston on May 27, 1917,—that is, a week ago Sunday?

A. I did.

44 Q. Did Mr. Johnston say anything to you at that time with respect to anything that he had done in connection with the fastening of the banner, between the day that he told you he had fastened it to the chimney and the day of the accident?

By Mr. Miller: Objected to, first, because it is an attempt to prove a declaration by an employe long after the agent's connection with the original work had terminated, and, therefore, it is incompetent; and, second, because it is generally incompetent, irrelevant and immaterial.

By the Court: As yet it does not appear what, if any, relation Mr. Johnston bears to the defendant company, so on its face it would not be competent, unless there was some evidence as to his connection.

By Mr. Jones:

Q. Who told you that they had fastened the banner to the chimney?

A. Mr. Johnston.

Q. Which Johnston?

A. H. B.

Q. What connection had he with the Electric Company?

A. He was an employe of the Dubois Electric Company, electrical foreman, I believe.

Q. Did he say who had made the fastening to the chimney?

A. He told me that he had the banner fastened to the chimney.

45 Q. What was done with the banner after it came down and pulled the chimney down?

By Mr. Miller: Objected to as being immaterial and irrelevant.

By the Court: Is this bearing on the question of the control by the defendant?

By Mr. Jones: It is.

By the Court: For that purpose the objection is overruled, and exception noted to defendant.



A. When I next saw the banner it was suspended the same as it had been.

By Mr. Jones:

Q. Where?

A. From the roof of the Commercial Hotel.

Q. When was this,—after the accident?

A. After the accident, yes, sir.

Q. How soon after the accident?

By Mr. Miller: We further object to it because it is incompetent to affect the defendant with liability. It is not proposed to show that the defendant had anything to do with re-stringing the banner.

By the Court: Of course, unless it is in some way connected, that objection would be good.

By Mr. Jones: By evidence that will follow later, the defendant's connection will be shown.

By Mr. Jones:

Q. When was that?

A. The evening, I believe, of the 12th.

Q. Did any one consult with you respecting the suspension of the banner, between the time of the accident and the time you saw it hung back there?

A. No, sir.

Q. Did you give any directions with respect to the re-stringing of the banner after the accident?

A. No, sir.

Q. Had you given any directions with respect to the stringing of the banner, at the time when they received it from you in the Acorn Club, up until the time of the accident?

A. No, sir.

Q. What was the first thing you had to do with the banner after the accident?

A. A couple of days after the accident I had it removed from the roof of the Commercial Hotel and from the bank down to the intersection of Brady and Long avenues, and fastened on telegraph and telephone poles.

Q. Who removed the banner finally?

A. From the poles?

Q. Yes?

A. The Dubois Electric Company.

Q. When?

A. I couldn't state just what time.

Q. How long after the accident?

A. It was right after the election.

Q. Did you give any directions to them to remove it?

A. Nothing more than when I asked them to put it up, I wanted them to take it down.

Q. And that was the time you asked them to attend to it?



A. Yes.

Q. Do you mean to say that from that time, the time you first engaged them, until the time they actually took it down, you hadn't said anything about it to them?

A. Except removing it from the roof of the Commercial Hotel to the telegraph posts.

Q. When Johnston spoke to you the evening that he mentioned he had tied it to the chimney, did he tell you what he had used to tie it up with at that time?

By Mr. Miller: Objected to as immaterial and irrelevant.

By the Court: It would depend entirely on whom he was acting for. If he was acting for the company it might be competent, but it would not be unless he was.

By Mr. Jones: I propose to prove that material was furnished by the defendant, without suggestion from this party to  
48 the contract, which the defendant was to take back when the banner was taken down.

By the Court: The objection is overruled and exception noted to defendant.

A. Mr. Johnston told me that he had furnished the wire cable, had restrung the wire, and when they would take the banner down they would return the wire cable and give me credit.

By Mr. Jones:

Q. Who had furnished the wire cable?

A. He had furnished it from the Dubois Electric Company, and it was to remain their property.

By Mr. Miller: Objected to as being leading.

By the Court: Just what was said.

By Mr. Jones:

Q. Who was to receive it when it had served its purpose?

A. Said they would take it back and give me credit.

Q. Were all the services that you have mentioned, performed by the Dubois Electric Co., a part of the original undertaking?

49 By Mr. Miller: Objected to as being a conclusion. It is a matter for the jury. He can testify to the facts, but not state his conclusions.

By the Court: He has already testified they had put it up. You can ask him whether there was any other arrangement. This is rather a conclusion.

By Mr. Jones:

Q. For all the services that you have detailed, performed by the Dubois Electric Co., have you paid them?

A. Yes, sir.

Q. Do you know the size of this banner?

A. I can't recall it just now.

## Cross-examination by Mr. Miller.

By Mr. Miller:

Q. When you went to make this arrangement, where did you go?

A. Dubois Electric Company's office.

Q. About what time of day was that?

A. I couldn't say.

Q. Whom did you see in the office?

A. I believe that Mr. C. E. Blakesley and Coulson Blakesley were in the office—one or both.

Q. C. E. Blakesley is Coulson?

A. Irvin Blakesley and Coulson Blakesley.

50 Q. You say they were both there?

A. I think they were both there.

Q. What connection does Coulson Blakesley have with this company?

A. I believe bookkeeper. I am not sure.

Q. What connection does Irvin Blakesley have with them?

By Mr. Jones: Objected to.

By the Court: If he knows.

A. Assistant superintendent, I think.

By Mr. Miller:

Q. Which one of these men did you address yourself to?

A. I don't recall. I went to the office and made my request.

Q. You say you went there and you asked them to put this banner up, and to take it down after the election?

A. Yes, sir.

Q. That is what you asked them to do?

A. Told them I wanted them to take the banner and put it up, and take it down and attend to it, that I didn't want to have anything to do with it.

Q. It was to be taken down after the election?

A. Yes, sir.

Q. The election was to be held November 5th of that year, was it?

A. I think so.

51 Q. Did they agree to that?

A. There was something said in regard to the work at that time, and the two fellows went with me and received the banner, and that was the last I had to do with it.

Q. When you first asked them to go and put this banner up, and then to take it down, didn't they say, "We won't have anything to do with it"?

A. Mr. Irvin Blakesley said something about he wouldn't have anything to do with it.

Q. He was the assistant superintendent?

A. Yes, sir.

Q. And he did say to you, "We will have nothing to do with it"?

A. Something of that kind, yes.

Q. Then you still continued to talk, didn't you?

A. I told them I wanted——

Q. Just answer my question. You continued to talk with him, didn't you?

A. No, sir.

Q. Didn't he say to you, "We won't have anything to do with it"?

A. One or the other, I think it was. Mr. Coulson said, "We will take the matter up and see what we can do."

Q. And then they didn't agree to anything when you first went there?

A. I left them when they said they would take the matter up and see what they would do.

Q. Didn't you then go back later, or while you were still there, say to them that the banner had to go up and you wanted them to put the banner up for you?

A. No, sir.

52 Q. Didn't they say to you that they couldn't even do that, because their men were out on the line somewhere?

A. Not that I recall.

Q. While you were talking there trying to persuade them to put this banner up for you, didn't one of their employes come in the office——

By Mr. Jones: Objected to, as there is a conclusion contained in the question—while he was trying to persuade them to put it up.

By the Court: I suppose that is a conclusion of the counsel. What the conversation was; what was done between the parties.

(Question withdrawn.)

By Mr. Miller:

Q. While you were talking there, did one of the employes come into the office?

A. I don't recall of them coming in.

Q. Didn't you testify just a minute ago that while you were there that Terrence W. Johnston came into the office?

A. No. He went with me to the Acorn Club.

Q. Was he there when you first went to the office?

A. I couldn't say.

Q. Do you remember who else was there, besides Irvin Blakesley and Coulson Blakesley, if anybody?

A. I do not.

53 Q. Are you sure now whether Terrence W. Johnston was in the office when you first went there?

A. I could not say.

Q. Do you know whether he and another employe came in while you were talking with Irvin Blakesley?

A. I do not know.

Q. What you asked them to do then was to put this banner up, and to take it down after the election?

By Mr. Jones: Objected to unless counsel asks regarding the facts that the witness has already stated.

By the Court: This is cross-examination, of course, and the question may be answered.

(Question read.)

By the Court: That is a statement, rather than a question.

By Mr. Miller:

Q. Is that what you said?

A. I went to them and asked them if they would put the banner up and take it down and attend to it for me, that I didn't want to have anything to do with it; I couldn't go up on the roof, and couldn't attend to it.

Q. Did they agree to do that?

A. Mr. Irvin Blakesley objected, but one or the other said "We will see what we can do later."

54 Q. Did you have any further conversation with them then about the matter?

A. Nothing more than the two fellows were sent with me to get the banner.

Q. When were they sent with you?

A. At that time, I think.

Q. Did you leave their office and go back before these two men went with you?

A. I think not.

Q. How long was that after you had had this conversation with Irvin Blakesley?

A. I couldn't say.

Q. Where did you and the two employees go from that office?

A. I believe we went to the Dubois National Bank and secured Mr. Brown, and went to the Acorn Club.

Q. Who was Mr. Brown?

A. Mr. W. G. Brown is cashier of the Dubois National Bank.

Q. Was he connected with this banner?

A. Nothing more than a contributor.

Q. Why did you go to see Mr. Brown?

A. Because I was not a member of the Acorn Club and he was, and he had the keys to the room.

Q. You got the banner there at the Acorn Club?

A. Yes.

Q. What did you do with it then?

A. It was turned over to the two employees of the Electric Company.

Q. That was Terrence W. Johnston and some other employee?

A. Yes.

Q. You don't remember who that was?

A. I think it was Dowd.

55 Q. Did you tell Mr. Johnston where this banner was to be suspended?

A. I had a letter—

Q. Answer the question. Did you tell Mr. Johnston where this banner was to be suspended?

A. I think not.

Q. How did he know where it was to be suspended, if you didn't tell him.

A. I couldn't tell you that.

Q. Didn't you give him a clamp to fasten on to the Commercial Hotel roof?

A. We furnished the cleats for the two sides of the street, yes, sir.

Q. And didn't you tell him it was to be fastened on to the Commercial Hotel roof?

A. I couldn't say for sure whether I did or not.

Q. Didn't you then say awhile ago that you didn't want to go up on the roof yourself, and you wanted them to take the banner down?

A. Yes.

Q. Didn't you tell him where he was to take the banner and put it up?

A. Not that I recall.

Q. You didn't tell him that one end of the cable was to be fastened to the Commercial Hotel?

A. I don't know as I did.

Q. Did you tell him that one end was to be fastened to the Deposit National Bank?

A. Not that I recall.

Q. Who did tell him where to extend the banner?

A. I couldn't say who told him where.

Q. You knew where the banner was to be suspended, did you?

A. Yes, sir.

56 Q. Where did you know it was to be suspended?

A. From the Commercial Hotel to the Deposit National Bank building.

Q. And where was the end to be fastened on the Commercial Hotel building?

A. I don't know as that had been decided when I was there.

Q. Why did you buy that cleat, that iron?

A. That was the instructions that came with the banner, to be fastened on either side of the street.

Q. You gave him that cleat to fasten to the hotel building?

A. Yes, sir.

Q. And you gave it to him to fasten it on the roof, did you?

A. I couldn't say that.

Q. How did Mr. Johnston know where you wanted this banner fastened?

A. I simply asked them to put it up there.

Q. To put it up where?

A. Between the Commercial and the Dubois Deposit National Bank.

Q. Then before he did put it up there you told him it was to be suspended between the Commercial Hotel and the Deposit National Bank?

A. Yes, sir.

Q. Then you did tell him where this banner was to be suspended?

A. What I mean——

Q. Just answer the question. You did tell him where this banner was to be suspended?

A. Not the exact location; no, sir.

Q. But you told him it was to be suspended from the Commercial Hotel and the Deposit National Bank?

A. Yes, sir.

Q. And you gave him the cleat to fasten on to the roof of the Commercial Hotel building.

A. Not necessarily the roof.

Q. Just answer the question. Isn't that the only place that cleat could be fastened, on the roof, on a flat surface?

A. I don't know.

Q. You say you hadn't any permission to fasten that to the Commercial Hotel building before that?

A. No, sir.

Q. Why did you tell Mr. Johnston it was to be fastened at the Commercial Hotel building, if you had no permission to fasten it there?

A. I told him that was where we wanted the banner put up.

Q. Hadn't you gone to Mr. Brown and made arrangements to have it put up there, before that day?

A. No, sir.

Q. Hadn't Mr. Hess made those arrangements?

A. I can't say.

Q. You say you hadn't spoken to Mr. Brown about it?

A. I judge not.

Q. Hadn't you gone to the Deposit National Bank to make arrangements?

A. No, sir.

Q. Don't you know that you attempted to put it up there first without making arrangements, and they wouldn't allow you to put it up on the Deposit National Bank building?

A. I wasn't there when——

Q. Don't you know that as a fact?

A. Nothing more than what has been told in the testimony. I wasn't there when they started to put it up.

Q. You or Mr. Hess represented yourselves a committee to get permission from the Deposit National Bank to put the banner up there?

A. I cannot say.

Q. Don't you know that as a fact?

A. No, sir; I do not.

Q. Didn't you hear that from Mr. Hess, the man who was operating with you?

By Mr. Jones: Objected to as not proper cross-examination.

By the Court: Was Mr. Hess a member of the committee?

By Mr. Miller: Yes, sir, and working with Mr. Skinner.

By Mr. Jones: It is not proper cross-examination because there was no statement of Mr. Hess getting the consent of the Deposit Bank.

By the Court: He can answer whether he had any knowledge on the subject. If he had any knowledge on the subject he might state what the knowledge is.

(Question read.)

By Mr. Jones: What do you mean by "operating with you"?

59 By Mr. Miller: In regard to this banner.

By Mr. Jones:

Q. Was Mr. Hess on the committee?

A. No sir.

By Mr. Miller:

Q. Wasn't he interested with you in having this banner suspended across the street?

A. No, sir.

Q. Don't you know that he went to Major McBride to get a permission to put this banner up on the Deposit National Bank building?

A. Mr. Blakesley told me that. Mr. Austin Blakesley told me that today.

Q. Didn't you know it before?

By Mr. Jones: Objected to as not proper cross-examination.

By the Court: That is a matter that is susceptible of proof. It would only be heresay. The objection is sustained and exception noted to defendant.

By Mr. Miller:

Q. You had lights strung, as I understand your testimony, so as to better display this banner?

A. Yes, sir.

Q. Who ordered those lights put up?

A. I did.

60 Q. When was that done?

A. I am not sure, but I believe it was about the 12th of October, about the day of this accident.

Q. You went to the Electric Company and ordered those lights put up?

A. Yes, sir.

Q. And did you tell them where to put them?

A. Nothing more than I wanted them put so as to illuminate the banner.

Q. At that time you knew where this banner was suspended?

A. Yes, sir.

Q. And you knew it was fastened at each end?

A. Yes, sir.



Q. The banner then had been up several days?

A. Yes, sir.

Q. Now you say the banner was removed from those buildings down to the junction of Brady and West Long avenue?

A. Yes, sir.

Q. On whose orders was that done?

A. On mine.

Q. Where did you give that direction to the company, where were you?

A. I think I gave that to Mr. H. B. Johnston.

Q. Where did you see Mr. Johnston?

A. I am not positive whether it was at the office or not.

Q. Following that direction, this banner was moved down to the juncture of these two streets, was it?

A. Yes, sir.

Q. Do you know what date that was?

A. I do not. Near the 17th.

Q. When was the banner finally taken down?

A. I believe the next day after the election, in the morning.

Q. Did you go to the company and ask them to take the banner down?

A. No, sir.

Q. Didn't you go to the company and say that you wanted that banner taken down right away?

A. No, sir.

Q. When had you said to them they should take it down after the election?

A. When I gave them the banner to put up.

Q. That is the only conversation you ever had with them as to what they were to do with this banner, they to put it up first?

A. They were to put it up, and, as I stated, take it down. I didn't want responsibility of it. When I had the lights put up I went to them at that time, and then when I had it removed from the Commercial roof down to the posts. That is the only three times I went to the Electric Company.

Q. But you didn't see any of them about taking it down after the election?

A. No, sir.

Q. You say you saw this banner suspended between the hotel and the bank building the evening after this accident?

A. Yes, sir.

Q. How was it fastened that evening?

A. I couldn't tell you.

Q. Do you know that it was actually suspended?

A. Yes, sir.

Q. With what was it fastened to the Commercial Hotel building?

A. I could not tell you.

Q. Where was it fastened?

A. I couldn't see where it was fastened.

Q. You don't know who fastened it there after this accident, do you?



A. After the accident?

Q. Yes?

A. No, sir.

Q. You didn't see anybody pull the banner up and fasten it at this accident?

A. No, sir.

Q. And you don't know who fastened it to the hotel building?

A. No, sir.

Q. The other cable had not come loose?

A. I believe not. I wasn't there when the accident happened.

Q. And so far as you know, the original fastening on the banner side was still there after this accident?

A. As far as I know; yes, sir.

Q. The first day that you were there at the office and Irvin Blakesley, the assistant superintendent, refused to have anything to do with it, you say that Coulson Blakesley said: "We will take it up" or "We will consider it," something like that—what were the exact words?

A. I couldn't recall.

Q. Do you know whether it was Coulson Blakesley or Irvin Blakesley that said that?

A. I am not positive of that.

Q. Are you sure that either of them said it?

A. Yes, sir.

Q. Can't you tell which one said it?

A. They were both there at the time, I believe, and I wouldn't be able to say which one.

C3 Q. Which one had you been carrying on the conversation with?

A. Most of my conversation was with Coulson Blakesley.

Q. But when it came to refusing to do anything, it was the assistant superintendent who refused, was it not?

A. He said he wouldn't have anything to do with it?

Q. Did they say who they were going to take up the question with?

A. No, sir.

Q. And yet before you left, you say, these two employes, either came in or were there, and then started off with you to get the banner?

A. Yes, sir.

Q. Did Irvin Blakesley tell them to go with you?

A. I can't say that.

Q. Did Coulson Blakesley tell them to go with you?

A. I couldn't say which one sent them with me. Some one.

Q. Did either of them?

A. Some one did; yes.

Q. Either of those men?

A. Yes, sir.

Q. That was after Irvin Blakesley said: "We will have nothing to do with it"?

A. Yes, sir.

Q. After he said that, didn't you simply make an arrangement

with them to put up that banner? Isn't that what they sent the two men along to do?

A. No, sir.

64 Q. You didn't have any further conversation with them at all about it then, did you?

A. After we left them there, do you mean?

Q. No; between the time that Irvin Blakesley refused and the time the men started with you.

A. Yes, sir; I talked to one of them.

Q. Which one?

A. I think it was Coulson. I am not positive of that.

Q. Irvin still stayed there, did he?

A. I am not positive about that.

Q. What was the conversation you had with Coulson.

A. We continued to talk about putting up the banner, and they said they would take up the matter and see what they would do, but allowed the two fellows to go along to get the banner.

Q. And he didn't take it up with anybody?

A. I couldn't tell you that.

Q. He just permitted these two men to go along with you then to put up the banner?

A. I couldn't tell you that. I couldn't say whether he took it up with any person else or not. I do not know.

Q. You stayed there all the time, didn't you?

A. Yes, sir.

Q. Do you know whether he took it up with anybody connected with the company?

A. Not that I know of, no, sir.

Q. He just permitted these men to go with you to get this banner?

By Mr. Jones: Objected to. It is a conclusion.

By Mr. Miller:

65 Q. Did he send them or just permit them to go with you?

A. He gave me the two men to get the banner. I don't know what you would call it, whether he permitted them or what?

Q. You say you paid this bill to the Electric Light Company for hanging this banner and for taking it down and stringing the lights. Did you pay that bill?

A. Yes, sir.

Q. You paid that yourself?

A. Yes, sir.

Q. Anybody else contribute to it?

A. It was out of a fund that was contributed by different parties.

Q. Who contributed to that fund?

A. There were several men.

Q. Who were they?

By Mr. Jones: Objected to as not proper cross-examination.

By the Court: I do not suppose it would be material.

By Mr. Miller:

Q. Was John Hess one of the contributors to this fund?

A. No, sir.

Q. You say he wasn't?

A. I say he was not.

66 Q. Do you remember that on the evening of the election, between 5 and 6 o'clock, you and John Hess went to R. R. Blakesley and asked him to have that banner taken down at once?

A. I do not.

Q. Do you deny that you did that?

A. I wouldn't deny I did it, but I don't remember of doing it.

Q. Didn't you say to him that "The election is about over and we don't want any bonfire made of this, and we want to get it out of the way?"

A. No, sir.

Q. Didn't Mr. Hess, in your presence, use about that language, and say: "We want to get the damned thing out of the way?"

A. Not that I recall.

Redirect examination.

By Mr. Jones:

Q. Was John Hess a member of your committee?

A. No, sir.

Q. What was the nature of Irvin Blakesley's complaint about putting up the banner?

A. He simply said he didn't want to have anything to do with it, or words to that effect. I don't recall just exactly what he said.

Q. Was the difference of political opinion involved in that conversation?

A. I don't believe so.

67 Q. Of what party was Mr. Blakesley? Was he of your political party?

A. I do not know exactly, but I think not.

Q. You paid the Electric Company for the services in connection with the banner?

A. Yes, sir.

Q. Did you pay either of these employes that went along with you, anything at all?

A. No, sir.

Q. Did you ever receive a bill for any services in connection with the banner, the suspension of the banner, etc., from any one other than the Electric Company?

A. No, sir.

Q. Have you ever paid any one for such services other than the Electric Company?

A. No, sir.

Q. Did you have any knowledge about where the banner was fastened on the hotel, other than what Johnston told you?

By Mr. Miller: Objected to as irrelevant and immaterial.

By the Court: Objection overruled. Exception noted.

A. Nothing more than hear-say. I was not on the roof and did not see where it was fastened.

By Mr. Jones:

Q. Where did Mr. Johnston tell you he had fastened that banner the evening he met you on the street, after it had come down the first time?

08 By Mr. Miller: Objected to as immaterial and irrelevant.

By the Court: If they had a conversation I think that conversation may be given.

A. He told me he had fastened it around the flue, down around the flashing close to the roof.

By Mr. Jones:

Q. Down around the flashing close to the roof?

A. Yes, sir.

Recross-examination.

By Mr. Miller:

Q. That was after he had put it up on the 2nd of October?

A. Yes, sir.

Q. And he notified you then that his work had been completed in putting up the banner?

By Mr. Jones: Objected to, as a conclusion.

By the Court: What the conversation was.

60 By Mr. Miller:

Q. Was that satisfactory to you?

A. I told him it was down around the roof. The flashing in the tin roof ought to be perfectly safe.

Q. Did you ever have any talk with Austin Blakesley as to what your contract was the day you went to the Electric Company to get them to put up the banner?

A. I think so. I think we talked.

Q. Did you say to him in that conversation that you asked the company to put up the banner and take it down, and they refused to have anything to do with it, and then you made a contract with them to put it up?

A. No, I didn't say that we then made a contract with them to put it up. I told them to put it up, and Irvin refused to have anything to do with it.

Q. Did you say to him that you asked them to put it up for you, and they did then?

A. Yes, sir.

Q. Did you have the same kind of a conversation with R. B. Blakesley, in which you made that statement?

A. Not that I recall.

By Mr. Jones: When?

By Mr. Miller: About one week ago this conversation occurred in Dubois.

By the Court: Call his attention to what the conversation was.

70 A. The conversation that I had with R. B. Blakesley was simply this: He said they didn't enter into a contract with me. I told them there was nothing said about a contract. There was no contract drawn up. I had simply asked to have this work done, and after Irvin had refused they went ahead and put it up. There was no written contract or no agreement, more than to put it up.

Q. That wasn't even said?

A. There was nothing said about a contract.

By Mr. Miller:

Q. Did you have a talk with me in Clearfield about one week ago at the County National Bank corner, in reference to what took place between you and these people at the Light Company when you were there?

By Mr. Jones: I object to this. It cannot be for the purpose of contradiction.

By the Court: He has a right to ask.

A. We had a conversation. I don't just remember what was in it.

By Mr. Miller:

Q. Did you say to me at that time, that you went there to ask this company to put up this banner, and then take it down after the election, and they refused to have anything to do with it?

71 A. I told you the same as my testimony this time. I asked them to put up the banner and take it down and look after it; I didn't want to have anything to do with it, and that Mr. Irvin Blakesley refused, but later went ahead and did it. You said to me at that time, "That isn't like your testimony at all," or something like that.

Q. Did you then say to me, "They afterwards sent the two men with me to put the banner up," and that was all that transpired?

A. No, sir.

By Mr. Jones:

Q. Have you told now all the conversation that transpired between you and the representatives of the Light Company, at the time you engaged their services with respect to this banner?

A. Yes, sir.

By Mr. Miller:

Q. Did you testify on the trial of this case once before, that it was your understanding that the defendant company was to take this banner down after the election?

A. I can't recall just how that testimony reads.

Q. Do you remember of talking with Mr. Austin Blakesley and R. B. Blakesley since that time, and saying to them that what you meant by that was that you had an understanding that you were going to ask them or request them to take it down after the election, but that there was no arrangement made at that time for them to take it down?

A. Not my testimony, unless before I used the word "understanding." I said that we understood it that way. There was an understanding when it was simply my intention that I would have them do that, and I had no right to say that they understood it that way, and that matter was discussed by me with Mr. Austin Blakesley.

Q. At the time you left the office down there, you simply had the intention of having them take the banner down after the election?

A. Yes.

Q. And there wasn't any definite arrangement made at that time that they were to take it down after the election?

A. No, sir.

By Mr. Jones: I move the answer be stricken out, because it is a legal conclusion as to what arrangement was made.

By the Court: Do you mean at the time he left?

By Mr. Miller: At the time he left with these two men to get the banner.

By the Court: He can answer it, subject to explanation.

By Mr. Jones:

Q. When you speak of a contract, to what do you refer?

By Mr. Miller: Objected to, because we didn't ask him about a contract.

By the Court: I think that may be answered.

A. I meant that there was no contract, no written contract between myself and the Electric Company.

Q. You had the conversation with them that you have testified to, about their putting it up, taking it down, attending to it, and that you were to have nothing to do with it?

A. Yes, sir.

Q. And after that they sent men with you to do the work?

A. Yes, sir.

Q. Did they do the work?

A. Yes, sir.

Q. Did they charge you for it?

A. Yes.

Q. You paid them for it?

A. Yes, sir.

Q. Was there any other conversation than that which you testified to?

A. No, sir.

Q. Was there any other arrangement than what you have testified to?

A. No, sir.

By Mr. Miller:

Q. Do you mean at that time you had an arrangement with them by which they were to put up this banner, and attend to it while it was up, and take it down after the election?

A. I mean simply this: I went there and asked them to put the banner up and to take it down after the election, and told them I didn't want anything to do with it, I didn't want to go on the roof, and I wanted them to attend to it. That was my real intention.

75

*Testimony of C. D. Oldknow.*

C. D. OLDKNOW, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. Where do you reside?

A. Dubois, Pennsylvania.

Q. How long have you lived there?

A. Fifteen years.

Q. What is your business?

A. I am employed by the Buffalo-Susquehanna Coal Company.

Q. What is your business with that company?

A. I am their engineer.

Q. Where is your office?

A. On the fourth floor of the Deposit Bank building.

Q. In Dubois, Pennsylvania?

A. Yes, sir.

Q. Did you see a banner strung across the street from the Deposit National Bank to the Commercial Hotel building in October, 1912?

A. I did.

Q. Would you recognize that as the banner (indicating)?

A. That looks like the banner.

76 Q. How does the height of the Commercial Hotel building compare with the floor your office is on in the building opposite? Is it higher or not, that is, the roof of it?

A. It is higher.

Q. Where was that banner fastened on the side of the Commercial Hotel building?

A. Fastened around the chimney.



Q. Whereabouts around the chimney was that fastened, with respect to the height of the chimney; was it at the bottom or top, or the middle?

A. I should judge it was half way up. I couldn't tell. I couldn't see the base of the chimney.

Q. In looking at that chimney on the roof of the Commercial Hotel building, from your office building, would you be looking up or down

A. Up.

Q. At an angle upward?

A. Yes.

Q. Could you see the flashing on the chimney from your office?

A. No, sir.

Q. Could you see the fastening of this banner around that chimney?

A. Yes, sir.

Q. That was visible to your view from your office, looking across?

A. It was.

Q. So that the fastening was above the flashing?

A. Yes, sir.

Q. How was the banner fastened at the bottom?

A. Do you mean the bottom corners?

Q. Yes. Was it flapping loose?

A. No; they were attached to the building.

Q. On either side of the street?

A. I only saw the Commercial side. I suppose the other was, too.

Q. Did you see the banner come down?

A. No, sir.

#### Cross-examination.

By Mr. Miller:

Q. Did you see the base of the chimney from your office window?

A. No, sir.

Q. What was this banner suspended on?

A. On a cable, wire rope.

Q. The cornice of the roof was between you and the base of the chimney?

A. Yes, sir.

Q. And you couldn't see this cable after it passed over the cornice of the roof?

A. I could see it.

Q. Did you see the cable from the cornice of the roof leading into the chimney?

A. Yes, sir; one side.

Q. Wasn't there a long, loose end of this cable that wasn't wrapped around the chimney?

A. I didn't see the loose end.

Q. Did you see the cable clear around the flue or chimney?

A. No, sir.

- Q. You could only see it on the side facing your office?
- 78 A. The front and one side.
- Q. Did you see any loose end?
- A. No, sir.
- Q. Of the cable?
- A. No, sir.
- Q. Wasn't there about nine or ten feet of an end that was not fastened around the chimney, left loose there, in front of the chimney?
- A. I didn't see any.
- Q. Couldn't you see that from your office window?
- A. No, sir.
- Q. Isn't that what you saw in place of the cable that was actually fastened around the chimney?
- A. No.
- Q. When did you first see this cable fastened there.
- A. I saw it probably four days before it fell. I couldn't tell just when.
- Q. How often did you see it?
- A. Three or four times.
- Q. You never went up there to examine it?
- A. No.
- Q. How far away from this flue were you?
- A. Possibly forty feet.
- Q. How wide is that street?
- A. I don't know.
- Q. Don't you know that that street is sixty feet wide between the buildings?
- A. No; I don't know the width of the street.
- Q. Can't you tell that it is about that wide?
- A. I couldn't tell how wide it is.
- Q. You were looking up at an angle?
- A. Yes, sir.
- 79 Q. How many feet lower was your window than the roof of the hotel building?
- A. I don't know that.
- Q. It was some considerable lower?
- A. Yes, it was lower.
- Q. But you couldn't see the lower half of this flue?
- A. No, sir.
- Q. You couldn't see the flashing around the flue?
- A. No, sir.
- Q. And you weren't up there to see whether this cable had been fastened around the flashing or not?
- A. No, sir.
- Q. How long had this been fastened to the flue before you saw it?
- A. I couldn't say.
- Q. Do you know when it was fastened up there?
- A. I know about the time. I don't know the date.
- Q. When was it?
- A. About a week before it fell.

- Q. And it was four days before it fell that you first saw it?  
A. Yes, sir.  
Q. Then it was there about three days before you saw it at all?  
A. It probably was.  
Q. After you saw it, you say the loop that was around the flue was about half way up?  
A. Yes.  
Q. Now, don't you know where the loop had been put when it was first put around the chimney?  
A. No, sir; I didn't see them put it on.  
Q. Might you be mistaken about the loop being half way up the chimney at all?  
A. Yes; maybe more than half.  
Q. Might that not have been nine or ten feet of an end, which was a part of this cable?  
A. That I saw?  
Q. Yes.  
A. No, sir.  
Q. Did you see any such end?  
A. No, sir.  
Q. Don't you know that after putting this around the chimney twice, and then clamping it on itself, that there was an end of this cable nine or ten feet long?  
A. I don't know that.  
Q. Did you see the cable?  
A. Only from the window.  
Q. And you didn't see any such end of the cable?  
A. No.  
Q. From your window could you see the end of the cable laid up against the front of the chimney?  
A. No, sir.

Redirect examination.

By Mr. Jones:

- Q. Did anything call your attention to this particularly?  
A. Just casually. I was looking out of the window, and noticed where it was fastened.  
Q. Did you ever remark about the fastening to any one?

81 By Mr. Miller: Objected to as immaterial.  
By the Court: If his attention was called to it particularly.

A. I did, in our office.

By Mr. Jones:

- Q. Did that chimney stand on the edge of the roof, was it facing with the eave of the roof?  
A. No, sir.  
Q. How far back did it stand?

A. I think it was in line with the building wall. I don't know how far back it was. It was back beyond the eaves.

Q. It was the width of the cornice back?

A. Yes.

Q. And about how far was that?

A. I couldn't say.

Q. About how thick was the cornice; do you have any idea?

A. Eighteen inches, I should say.

*Testimony of Lloyd T. Taylor.*

LLOYD T. TAYLOR, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. Where do you reside?

A. Dubois.

Q. Pennsylvania?

A. Yes, sir.

Q. What is your business?

A. I am a tinner.

Q. For whom do you work?

A. I work for Hibner-Hoover Hardware Company.

Q. Where is the tinshop of the Hibner-Hoover Hardware Company in Dubois?

A. It was on the fifth floor of our building.

Q. What is your building? Is it their building?

A. Yes, sir.

Q. That is the place where you are employed?

A. Yes, sir.

Q. How long have you worked for Hibner & Hoover?

A. About eighteen years.

Q. Are you foreman of their shops?

A. Yes, sir.

83 Q. What position does your building, the Hibner & Hoover building, occupy with respect to the Commercial Hotel building in Dubois?

A. We are right up against the hotel building.

Q. On what side do you abut on that building, that is, the Commercial Hotel?

A. On the Brady street side.

Q. Do you remember the banner strung across Long avenue from the Commercial Hotel building to the Deposit National Bank? That is, the front of your building is on Brady street?

A. Yes, sir.

Q. And that is, the front of your building touches the Commercial Hotel on Brady street, but the building line between the two buildings would be parallel with Long avenue?

A. Yes, sir.

Q. Supposing this is Brady street here, this is Long avenue here, and the Deposit National Bank is over here?

A. Yes.

Q. This is Long avenue?

A. Yes.

Q. The banner was erected between the Commercial Hotel and the Deposit National Bank building?

A. Yes, sir.

Q. Was it some distance back from Brady street, or not?

A. Yes; it was back, I suppose, in the neighborhood of 25 or 30 feet.

Q. Twenty-five or thirty feet back from Brady street was where the banner was suspended across the street. Now, the Commercial Hotel building faces on Brady street and Long avenue?

A. Yes, sir.

Q. And your building is up here on Brady street?

A. Yes.

Q. And runs back along the side of the Commercial Hotel?

A. Yes, sir.

Q. As I understand you, the tinshop you work in is on the fifth floor of this building?

A. Yes.

Q. How high is the Commercial Hotel building? As high as your building?

A. No. We are almost a story higher than they are.

Q. Are there any windows on the fifth floor of your building, that is, from your workshop looking out over the roof of the Commercial Hotel building?

A. Yes, three.

Q. How high are those windows from the floor, the bottom?

A. One of them is about two feet and the other two are about four or four and a half; along there.

Q. That is, in your tinshop?

A. Yes.

Q. What is the distance from the bottom of your window to the roof of the Commercial Hotel building?

A. I should imagine along about eighteen or twenty inches.

Q. So the roof of the Commercial Hotel building comes up a little higher than the floor of your workshop?

A. Yes.

Q. And looking out the windows you look out over the roof of the Commercial Hotel?

A. Yes.

Q. Did you notice where that banner was fastened on the side of the Commercial Hotel building?

A. I did.

Q. Where was it fastened—did you notice where it was?

A. Yes.

Q. Where was it fastened?

A. Around the flue.

Q. What flue was that? That was the one back from Brad street?

A. The one on Long avenue.

Q. Do you know anything about that flue? Had you ever done any work about it?

A. Yes, when it was first put up there.

Q. What did you do about it?

A. I flashed them.

Q. What do you mean by putting flashing around them?

A. Tin flashing.

Q. What do you do when you flash a chimney? What did you do when you flashed this one?

A. Generally flash them all alike; run tin up the side——

Q. How high up the chimney did you run your flashing?

A. About two bricks.

Q. From the roof?

A. Yes.

Q. How high was the chimney?

A. About 45 inches, I think.

Q. What was the nature of this chimney, the character of its construction?

A. Brick.

86 Q. What were the joints made of?

A. Mortar.

Q. How many brick thick was it?

A. One.

Q. The width of a brick, or the length of a brick?

A. The width.

Q. How thick would that be?

A. About four inches.

Q. What was the design of the construction? Was it a straight chimney, or not?

A. No. It was straight up towards the top and then it flared out and kind of a cornice built on.

Q. What is that cornice built of?

A. Brick.

Q. All brick?

A. Yes.

Q. Was there a top on it?

A. Yes.

Q. What kind of a top?

A. A cement top.

Q. What did that top stand on?

A. It stood on brick on the four corners.

Q. Brick posts?

A. Yes.

Q. How high were those posts?

A. I should judge about three brick; two or three brick.

Q. Did you see the fastening made to the chimney?

A. No. I seen it after it was fastened there.

Q. How soon after it was fastened?

A. That same day.

Q. Who fastened it there?

A. Mr. Johnston was one of them.

Q. Did you see him working there?

A. Yes.

Q. Which Johnston?

A. Bert Johnston.

Q. Is that the one who is known as H. B. Johnston, the older man?

A. Yes.

Q. The father of the boys?

A. Yes.

Q. Did you have any conversation with Johnston?

A. No, sir.

Q. Where was that fastening made about the chimney?

A. As near as I can recollect, about ten or twelve inches above the flashing.

Q. Did you observe that after you saw the banner fastened the way it was put there? Did you observe it after that?

A. How do you mean?

Q. Any days after that, did you see it?

A. Yes, I seen it every day, probably, until it fell down.

Q. And was that fastening at the same place about the chimney each time you saw it, or not?

A. As near as I could tell, it was, yes, sir.

Q. Was it ever fastened about the flashing?

A. Not as I ever seen it.

Q. Did you weigh that banner for us here at a former trial, at my request?

A. I saw it weighed, yes.

Q. Did you notice what the scales recorded?

A. If I can recollect it right, it was thirty-five pounds, I think; thirty-five something; pretty close to that some place.

Q. Do you know the dimensions of it?

A. No, I don't.

Cross-examination.

By Mr. Miller:

Q. Did you do the work on the flashing of this flue yourself, or superintended it?

A. No; I superintended it.

Q. You know what was done?

A. Yes, sir.

Q. When you put this flashing in, between the brick at the top, the place where you cut out the mortar, did you put anything in there to take the place of the mortar after the tin was put in?

A. We always put something in.

Q. What did you put in in this case?

A. I couldn't say what we did put in there. We generally use either cement, or just common cement, or anything we get hold of.

Q. Do you think you put cement in there?



A. No, I wouldn't say I did. I don't recollect.

Q. Didn't you testify at the other trial of this case, you did put cement in there?

A. I don't know whether I did or not.

Q. If you did so testify, was that correct?

A. I don't recollect what I put in.

Q. That is what—

A. I might have put cement in, but understand there is different kinds of cement.

89 Q. That is what you generally put in?

A. Yes. So we call it all cement. There is lots of different kinds of cement, but it is all cement.

Q. Do you know what you put in this flue?

A. Cement of some kind.

Q. Have you any personal recollection about the work on this flue at all?

A. Yes, I have. I know we did it.

Q. And you know you put cement in, do you?

A. We probably put something in. I never left a flue I didn't put cement of some kind in.

Q. Were you ever up on the roof after this cable was fastened around the flue?

A. Yes.

Q. Before the day of the accident?

A. While the cable was fastened there? No, I don't know that I was.

Q. You never went over to the flue to see how it was fastened around?

A. No, sir.

Q. Did you see where the flashing ended on the flue, from your window?

A. Yes, sir.

Q. What color was the flashing?

A. Black.

Q. What color was the flue?

A. A light brick, buff.

Q. Wasn't the flue painted the same color that the flashing was?

A. No.

Q. Didn't it have black paint on it.

A. The flue?

Q. Yes?

A. No, sir.

90 Q. How far up did the black paint run?

A. Up to the top of the flashing.

Q. Was there any tar paper or paint on the flue above the flashing?

A. Not as I can recollect, no; might have been a little daub on the edge.

Q. The closest you were to it was from the window at your workshop?

A. Yes.

Q. You were standing inside?

A. Yes.

Q. What was the distance from that window across to where this  
he was?

A. About 75 feet, I suppose.

Q. When did you see this cable first around the flue.

A. I saw it the day they put it up there.

Q. What day was that.

A. I don't know.

Q. What time in the day was it?

A. I don't hardly recollect that.

Q. How do you know it was the day they put it up?

A. I seen them working there.

Q. You can't tell what time of the day it was?

A. I wouldn't swear.

Q. Who was working there besides H. B. Johnston?

A. One of his boys was there.

Q. Did you recognize the boy at that time?

A. I don't know whether I knew which one of the boys it was.  
I don't know his boys very well. I don't know one from the other.  
I know them now better than I did then. I know the old gentle-  
man.

Q. But you can't tell what time in the day it was?

A. No, I wouldn't swear what time in the day it was.

Q. How soon after they left was it that you saw this?

A. I don't know.

Q. Did you see them leave at all?

A. No.

Q. So you don't know when they left?

A. No.

Q. Don't know when they put it up, what time of day it was?

A. I wouldn't like to say.

Q. How many times was this cable wrapped around the flue?

A. I don't know.

Q. Couldn't you see that from your window?

A. I suppose if you had just stopped and looked.

Q. You didn't stop very much to look at that flue, did you?

A. I stopped and looked at it several times.

Q. The only way you saw the flue was when you were passing the  
window?

A. No; I stopped and looked at it and talked about it.

Q. When did you ever stop and look at it?

A. The very day they put it up. We talked about it.

Q. Did you see a loose end of the cable there?

A. There might have been a loose end. I didn't see a loose end,

Redirect examination.

By Mr. Jones:

Q. Do you remember the day the chimney pulled over?

A. Yes.

Q. Where were you at the time?

A. I was in the shop.

Q. What did you do? Did you see the chimney after it had pulled over?

A. Yes, seen what was left of it.

Q. How close to it were you?

A. I was in the shop. I didn't go out of the shop.

Q. After it pulled over?

A. Yes.

Q. What was left of it, what you could see from your shop?

A. Just the stub of it.

Q. What do you mean by that?

A. The flashing part of it.

Q. What was above the flashing was gone?

A. Yes, that was gone.

Q. Was the fastening gone? Is that what you mean?

A. Yes, everything was gone.

Q. There was nothing left of the fastening after the top had left?

A. No.

Q. What was the width of that chimney? It was a square chimney, was it?

A. Yes, about 21 inches square.

93 Q. Have you in your work as a tinsmith, had much to do with chimneys?

A. Quite a bit.

Q. Do you know the effect on chimneys of cutting them in like you do to flash them?

A. Yes.

Q. Do you ever raze chimneys,—tear them down?

A. How do you mean?

Q. In your work as tinsmith, have you torn down chimneys?

A. No, I don't know as I ever did tear them down.

Q. You have flashed a number of chimneys?

A. Yes, I flashed lots of chimneys.

Q. How many years have you been flashing them?

A. Ever since I have been at my trade, and that is a good many; about thirty-five years.

Q. Would you state whether or not in the knowledge you have gained from your experience with respect to flashing chimneys whether or not this particular chimney, cut in as it was for flashing was a safe place to which to tie that big banner?

By Mr. Miller: Objected to, as the witness hasn't shown himself competent to testify.

By the Court: I think that would involve a good many elements and would be a conclusion under all the facts. I think it would be a question of fact for the jury under all the circumstances, rather than for the testimony of the witness. The objection is sustained.

By Mr. Jones:

Q. You have testified it would have a tendency to weaken the chimney?

A. Yes, it would any chimney.

Recross-examination.

By Mr. Miller:

Q. The stub of this chimney, up to the top of the flashing, remained there on the roof?

A. Yes, sir.

Q. Do you know about how far in to the joint of this flue you cut to put the flashing?

A. The tin was turned in about an inch.

Q. And then you filled up that space with some kind of cement?

A. Yes, just to keep the water out.

By Mr. Jones:

Q. Does the cement unite with the tin?

A. No. No cement will unite with the tin very long.

Q. What did you say was the purpose of putting the cement in?

A. To keep the water from running in.

Q. Does putting the cement in there have any tendency to strengthen the chimney after it has been cut in?

A. I don't think very much.

Q. How high was that stub which was left, how high was the top of the flashing off the roof?

A. If I remember right, I think it was  $7\frac{1}{2}$  inches, the high part of that would be the back of the flue.

Q. This roof was a slightly sloping roof?

A. Yes.

Q. Which direction did it slope?

A. It sloped back towards Hibner & Hoover.

Q. Back toward your place?

A. Yes.

Q. So the high part of the roof was the outside of the roof, and that was true as to Brady street, it sloped back this way?

A. Yes.

Q. How far back from the edge of the roof was this chimney?

A. About 35 inches.

Q. From the edge of the roof?

A. Yes.

Q. Suppose the roof sloped back like that. That was the way the roof sloped back?

A. Yes.

Q. And the chimney was standing here, the flashing was the narrowest on the side toward the street?

A. Toward Long avenue.

Q. And was the deepest on the back of the flue?

A. Yes.

Q. You say it was how deep at the back of the flue?

A. I think  $7\frac{1}{2}$  inches.

Q. How deep on the front of the flue?

A. I think  $4\frac{1}{2}$ , the low side.  $4\frac{1}{2}$  and 7.

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*Testimony of Frank E. Breon.*

FRANK E. BREON, a witness called in behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination:

By Mr. Jones:

Q. Where do you live?

A. Dubois, Pennsylvania.

Q. What is your occupation?

A. Tinsmith.

Q. For whom do you work?

A. Hibner & Hoover Hardware Company.

Q. The same that Mr. Taylor worked for?

A. Yes.

Q. Where is your workshop?

A. Fifth floor of the Hardware Company.

Q. Are you in the same workshop Mr. Taylor is in?

A. Yes.

Q. Did you hear Mr. Taylor's testimony?

A. Yes, sir.

Q. Did you have the same opportunity for observation of the Commercial Hotel—

By Mr. Miller: I object to the form of the question.

(Question withdrawn.)

97 By Mr. Jones:

Q. Do you remember a banner fastened from the Commercial Hotel building to the Deposit National Bank, across Long avenue?

A. Yes, sir.

Q. And did you see how that was fastened to the Commercial Hotel?

A. Yes.

Q. To what was it fastened?

A. It was fastened around the chimney.

Q. How was it fastened around the chimney, whereabouts, with respect to the height of the chimney?

A. I never measured it, but I would judge from about 12 to 18 inches above the roof.

Q. How high was the flashing? Was it above the flashing, or not?

A. I never measured the flashing, but I suppose it was about 7 or 8 inches.

Q. You are sure it was above the flashing?

A. Yes, sir. As near as I could judge, it was directly above the flashing.

Q. Did you see it the day it was fastened there?

A. I can't recall that I saw it that day.

Q. Did you see workmen on that roof?

A. Yes.

Q. Whom did you see working about that chimney?

A. I didn't see anybody working about that chimney.

Q. Did you see anybody making the fastening about the chimney?

A. No, sir.

98 Q. The first time you observed it after it was fastened there, it was fastened as you have stated, about two or three courses above the flashing?

A. Yes.

Q. Did you notice it after the first time you saw it there, different days after that?

A. Yes, sir.

Q. Do you remember the day that the chimney went over?

A. Yes, sir; very distinctly.

Q. Where were you at that time?

A. Right inside the window in the shop.

Q. Did you see it go over?

A. No, sir.

Q. Was that fastening changed on the chimney, between the time you first saw it there and the last time you saw it there?

A. No, sir. It remained in the same place.

Q. Did you notice the chimney, what was left of the chimney after the main part had pulled over?

A. Yes, sir.

Q. What was left of it, how much?

A. Just the flashing; from the flashing down to the roof.

Q. The part that was flashed?

A. Yes, sir.

Q. Had the fastening gone over with the part of the chimney that was pulled down, the fastening?

A. Yes, sir; it all went off the roof.

Q. Did any part of the cable fastening remain to the chimney after the main part of the chimney had gone down?

A. No, sir; not what was on the roof; it didn't remain to any part of the chimney that was left on the roof.

99 Q. It had gone with the part that went over the roof?

A. Yes, sir.

Q. Did you go on that roof that afternoon, after the chimney was pulled over?

A. Yes, I went right out.

Q. What called your attention to it?

- A. I was working right at the front window and heard the crash.
- Q. You mean the Brady street side?
- A. The Brady street side.
- Q. And the chimney was over on this side?
- A. Yes.
- Q. And you were working at the front window and you heard a crash?
- A. Yes, and I looked out the front window on the Brady street side and I saw people running up towards the corner.
- Q. Where did you see the people running?
- A. Going up Brady street, towards the intersection of Brady street and Long Avenue.
- Q. Then what did you do?
- A. I went over and jumped out of the window and went out on the roof.
- Q. You got out of one of Hibner & Hoover's windows on the roof?
- A. Yes, on the Commercial hotel.
- Q. Then what did you do?
- A. As soon as I got out of the window I saw what the trouble was, and I walked over and looked down the edge of the roof.
- Q. What did you see?
- A. I saw a lot of bricks lying down there, and a crowd of people down there, and a man's hat lying on the brick.
- 100 Q. When you got there to the chimney, what was left of the chimney?
- A. The part that was flashed.
- Q. Did you ever remark about the fastening about the chimney, to any one?
- A. No, sir.

Cross-examination.

By Mr. Miller:

- Q. How far was your window away from this flue?
- A. I should judge about 70 or 80 feet; along there somewhere.
- Q. Had you ever been out on this roof and over to this flue, before the day it fell?
- A. Do you mean between the time the fastening was put on there and the time it fell?
- Q. Any time before that?
- A. Yes, sir, I had been out on the roof lots of times.
- Q. Over to this flue?
- A. All around over the roof.
- Q. How high do you say that flashing was up on the flue, if you know?
- A. I never measured, but I judge about 7 or 8 inches, from the looks of the stub that was left there.
- Q. After the flue fell, you say all the stub of this flue was there, that was originally covered with flashing?



A. Yes, sir.

Q. And the only part that had gone away was the brick above the flashing?

101 A. Yes, sir.

Q. Did you see the men put this cable around the flue the day it was put there?

A. No, sir.

Q. You don't know when it was put there, what time of the day or what day of the week it was?

A. No, sir.

Q. Do you know what day in the week you first saw the cable around the flue?

A. No.

Q. What kind of a cable was this?

A. It was a wire cable.

Q. About how thick?

A. I would judge about  $\frac{5}{8}$  or  $\frac{3}{4}$  inch.

Q. Do you know how it was fastened around the flue?

A. If I recall, it was looped like it started there, came around the flue, went around again, and it was clamped on to the main line there.

Q. Looped twice around the flue and then clamped on itself?

A. Yes.

Q. Did you see the cable after the flue fell?

A. I saw it down in the street. I wasn't close to it, only looked down from the roof, the four stories.

Q. That loop wasn't broken, and the cable wasn't broken?

A. I don't know.

Q. Couldn't you see it from the roof?

A. See the cable?

Q. Yes?

A. I could see the cable.

Q. Did you see the loop in the cable?

A. I didn't take notice.

102 Q. How often did you see this cable around the flue, between the time you first saw it and the time the flue fell?

A. Well, quite often, because in walking back and forward through the shop, the window was just high enough you could just glance out of it.

Q. And you would simply see it by glancing at it?

A. I usually looked out there and often stand there and look out across.

Q. Had you been in the habit of doing that before this time?

A. I always did it. We have some of our machines right in front of that window.

Q. And you were standing there looking out at what?

A. Out over the roof.

Q. Just looking out over the roof?

A. We had a bench there in front of both those windows, and machines there, and worked there.

Q. Did you work at this bench?

- A. No, sir, not all the time. It was just an extra bench.
- Q. And you looked out this window every time you went to that bench?
- A. Yes, sir; a good many times we all just walked by.
- Q. How many days did you see this cable suspended there?
- A. I couldn't recall just how many days.
- Q. Was it three or four days?
- A. It wasn't very many.
- Q. Three or four days before it fell?
- A. Yes.
- 103 Q. The first time you saw it then, you say it was above the flashing?
- A. Yes.
- Q. But you don't know where it was put when it was first put around the flue?
- A. I didn't see them put it around the flue.
- Q. You don't know where it was put then, because you didn't see it put there?
- A. No.
- Q. And it was only three or four days before it fell that you first saw it?
- A. I don't know how many days it was. I can't recall.
- Q. You said about three or four days?
- A. No, I didn't say how many.
- Q. What do you say now?
- A. I say I can't recall how many days I saw it there.
- Q. What is your best recollection about it?
- A. I wouldn't like to make a guess on it. I saw it there, but I wouldn't say how often or how many days.
- Q. When you did see it, you say it was about half way up the flue?
- A. No, sir. I said about 12 to 18 inches; two or three courses above the flashing.

Redirect examination.

By Mr. Jones:

- Q. I understood you to say that all of the time that you saw that fastening, that cable fastening about the chimney, it remained at the point where you first saw it, which was two or three courses above the flashing?
- 104 A. Yes, sir.

*Testimony of Charles B. Hammer.*

CHARLES B. HAMMER, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. Where were you working in 1912, in October?

A. Dubois, Pennsylvania.

Q. Where were you working in 1913, in October?

A. I was doing day work at the Commercial hotel.

Q. Do you recall any one that is an employe of the Light Company coming to your hotel there for the purpose of fastening a banner to the hotel?

A. Yes, sir.

Q. Did you say anything to them with respect to the matter of fastening the banner to the hotel?

A. I asked——

Q. Did you say anything?

A. Yes.

Q. What was your conversation with them—Who was the man?

A. Mr. Bert Johnston, and one or two other men from the Electric Light Company.

Q. Will you tell us what you said, what the conversation was between you and Johnston, with respect to fastening that banner to the hotel?

106 By Mr. Miller: I would like to have Mr. Jones specify which time this was.

By Mr. Jones: This was the first time they ever went there, before the banner was put up at all, when they went there for that purpose.

By Mr. Jones:

Q. Will you state what that conversation was?

A. They started up the stairs, and I asked Mr. Johnston where they were going. He said they were going up to the roof to fix the banner, or words to that effect.

Q. Had a banner been fastened across Long avenue at this time? Was the banner suspended across at this time?

A. Not to the best of my knowledge. I didn't see the banner put up.

Q. What did you say you asked Johnston?

A. I asked him where they were going. He said they were going up to the roof to fix the banner.

By Mr. Miller: I would like to ask the purpose of this testimony.

By Mr. Jones: The object of the testimony is to show that the only one that saw about the erection of this banner at the hotel was the employes of the Light Company.

107 By Mr. Miller: We object to it because the testimony does not tend to prove that nobody else say about getting permission, and there is no evidence to show that this man either had or had not authority to grant permission for the stringing of this banner on the hotel, and because it is generally incompetent, irrelevant and immaterial.

By Mr. Jones:

Q. At the time you spoke of, was Mr. Bensinger at the hotel?

A. Mr. Bensinger was away at that time.

Q. Who was the landlord of the hotel?

A. In his absence?

Q. He was, wasn't he?

A. He was the landlord.

Q. He was away at the time?

A. Yes.

Q. How long had he been away?

A. I don't recall.

Q. Was he in town?

A. No, he was away on a trip, he and his wife.

Q. Who was in charge of the hotel?

A. I was at the time.

Q. Will you just detail the conversation you had with Johnston?

By Mr. Miller: We renew our objection.

By Mr. Jones:

Q. That is, respecting the fastening of the banner to the hotel.

108 By the Court: I think these facts may be shown, the effect of this testimony to be considered with all the testimony on the case. The objection is overruled, and an exception noted to defendant.

A. I asked Mr. Johnston, where he was going and he said they were going up to the roof to fix the banner. I told him that Mr. Bensinger was away, and in his absence I had no authority to allow them to do anything. Mr. Johnston said that would be all right, or words to that effect.

By Mr. Jones:

Q. Did he go ahead, or not?

A. I told him if he did anything it would have to be without my consent, because I had no authority to give him. He said they would take the responsibility.

By Mr. Miller: I ask to have the last part stricken out.

By the Court: As far as possible, give the conversation, or the substance of it, as nearly as you can. We will strike out the last answer.

By Mr. Jones:

Q. What did Mr. Johnston say that led you to believe what you said you did?

By Mr. Miller: Objected to as suggestive and leading.

By the Court: I think the witness understands that he must not draw conclusions, but give the conversation as nearly as he can, or the substance of it.

A. I don't remember the exact words, but the substance was that they would take the responsibility for anything they did.

By Mr. Miller: We object to that last answer, as it is a conclusion and not an attempt to give any conversation or the words of any conversation, and it is therefore incompetent and we ask to have the last answer stricken from the record and the jury directed to disregard it.

By the Court:

Q. In this answer that you have given, did you give us the substance of his statement as nearly as you can recollect?

A. Yes, sir.

By the Court: The objection is overruled and an exception noted to defendant.

By Mr. Jones:

Q. What then did he do, if anything?

A. They went on upstairs to the roof.

Q. Did you give your consent to their going up there?

A. No, sir.

110 Cross-examination.

By Mr. Miller:

Q. Do you know what day of the week this was?

A. No, sir; I don't.

Q. Do you know what day of the month it was?

A. I don't know the date. I don't remember.

Q. Had there been a banner suspended across West Long avenue before that?

A. Not to my knowledge.

Q. Had you heard of a banner being strung across there?

A. No, sir.

Q. Who was with H. B. Johnston?

A. There were one or two other men with him. I don't recall who they were.

Q. Are you sure this conversation was with H. B. Johnston?

A. Yes, sir.

Q. You can't be mistaken about that?

A. No, sir.

Q. And you are sure this is the first time that the banner was hung on the Commercial Hotel?

A. Yes, sir.

Q. You can't be mistaken about that? You can't tell who was with H. B. Johnston?

A. I don't recall who the men were with him, no.

Q. Was there anybody else in the hotel within hearing?

A. There were quite a number of people in the lobby, yes, sir.

Q. Do you recall anybody else that was within hearing of  
111 what took place between you and Johnston?

A. No, I don't.

Q. Did Mr. Johnston have the banner with him that day?

A. I didn't see the banner, no.

Q. You didn't see any banner at all that day, did you?

A. No, sir.

Q. And none of these men that were in the hotel had the banner with them?

A. Not that I saw.

Q. You didn't see them hang the banner that day?

A. No, I was in the office.

Q. And you didn't go up to see what they were doing?

A. No, sir.

Q. Did you look out the office windows to see if the banner was suspended?

A. Not at the time, no, sir.

Q. Did you that afternoon or that day at all?

A. I can't recall.

Q. Do you know whether the banner was suspended that day?

A. Yes, sir.

Q. How do you now?

A. I know; I saw it up there that night.

Q. Did you see it there before that night?

A. I didn't see it before that, no, sir.

Q. It was suspended right by your office window, wasn't it?

A. I couldn't see it from the office without going to the door.

Q. You couldn't see it right through the office window?

112 A. I might have seen it from the window, yes.

Q. Your office window was closer to you than the door was to you, wasn't it?

A. Yes.

Q. And you didn't see it through the window?

A. Not that I remember. I don't remember seeing it.

Q. How long was that before the happening of this accident?

A. I couldn't tell you that; I don't recall.

By Mr. Jones:

Q. State whether or not Johnston and the men with him had tools with them at the time they came in there to go up?

By Mr. Miller: Objected as leading.

By the Court: What had they with them, if anything.

By Mr. Jones:

Q. What had they with them, if anything?

A. They had tools in their hands when they went up.

By Mr. Miller:

Q. What did they have?

A. I couldn't tell you.

Q. How do you know they had tools?

A. I know they had something in their hands. I presumed they were tools.

Q. Then you don't know that they had tools, do you?

A. I don't remember just what they had.

Q. Why did you swear they had tools in their hands? Why did you do that? Can you tell now?

A. I couldn't tell you just what tools they had, but I know they had tools with them.

Q. You knew just a minute ago that you couldn't tell whether they had tools in their hands, didn't you? Didn't you know that? Then why did you swear there that they had tools in their hands, when you didn't know it? Can you answer that question?

A. I couldn't tell just what tools they had. I don't remember that.

Q. You don't know whether they had tools or not, do you? You don't know whether they had tools or not, do you—answer that?

A. I can't remember just what they had in their hands.

Q. But yet you were willing to swear, or swore a minute ago that they had tools in their hands? Why did you do that?

A. I should have said they had something in their hands which I supposed were tools, but I don't remember just what it was.

Q. Why didn't you say that in the first place, if that is what you should have said? Can you give any reason for not so doing?

A. No, sir.

Q. And may you not be just as far off when you say that H. B. Johnston was there, as you were in saying they had tools in their hands?

By Mr. Jones: That is objected to.

By the Court: That is assuming, of course, that they did have tools. He simply does not know.

By Mr. Jones: I object to it as not being proper cross-examination, and being augmentative and a conclusion of fact.

(Question read.)

(Question withdrawn.)

Redirect examination.

By Mr. Jones:

Q. Was Mr. Bensinger back from the time Johnston came in there, that you have testified to, until after the accident?



A. No, sir.

Adjourned until Tuesday, June 5th, 1917, at 10 o'clock A. M.

115

*Testimony of John F. Sober.*

Tuesday, June 5th, 1917.—Morning Session.

JOHN F. SOBER, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. Where do you live?

A. Dubois, Pennsylvania.

Q. What is your business?

A. Carpenter.

Q. How long have you been a carpenter?

A. Probably thirteen or fourteen years, since I started in.

Q. How long have you lived in Dubois?

A. I was born and raised there.

Q. Were you in Dubois in the fall of 1912?

A. I was.

Q. Where were you working the early part of October of 1912?

A. About the hotel there, the Commercial hotel.

Q. What part of the hotel were you working about?

A. Around through the aere-way there, where the stack came up through, and up on the roof.

116 Q. An are-way where the stack came up through?

A. Yes, sir.

Q. Did it come above the roof or not?

A. It did.

Q. Were you working about the stack?

A. I was.

Q. What kind of a stack was that?

A. It was an iron stack.

Q. Did your work require you to be on the roof of the Commercial hotel?

A. It did.

Q. Do you know anything about the suspension of a banner from the Commercial hotel across the street, while you were working there?

A. I know they started to suspend one; they said they were.

Q. Who started to suspend one?

A. Terry Johnston.

Q. T. W. Johnston, is that the one you mean?

A. The middle man there (indicating).

(T. W. Johnston was asked to rise.)

Q. Is that the Mr. Johnston?

A. That is the one.

Q. Who else was with him?

A. I have forgotten who the other fellow was. There were two of them.

Q. There were two of them there?

A. Yes, sir.

Q. And this Johnston was one of them?

A. Yes, sir.

Q. Did they have the banner there?

A. No, they did not.

Q. Where was the banner?

A. I don't know. I hadn't seen it at all.

117 Q. What did they have with them?

A. They were trying to get a rope—they had thrown a rope out the back window, and they were trying to get it up on the roof of the hotel.

Q. What were they trying to get up?

A. This rope, and they had an iron fastener of some kind of a cleat lying there, and they were talking about fastening that to the roof.

Q. Fastening what to the roof?

A. This cleat they had.

Q. An iron cleat?

A. Yes, sir.

Q. Did they fasten that iron cleat to the roof while you were there?

A. They did not.

Q. Did you have any conversation with them, or did they say anything to you with respect to the use of the chimney as a place to which to fasten the banner?

A. They did.

By Mr. Miller: I ask the purpose of this.

By Mr. Jones: Counsel for plaintiff offers to show by the witness on the stand, the conversation between the employees of the Light Company and the witness, respecting the use of the chimney as a place of anchorage for the banner, showing the matters pointed out by the witness to the employee of the Light Company, concerning the Light Company's employee's intention to use the chimney, and the explanation of the witness to them as to the unsafety of such a place as a fastening for the banner.

118 By Mr. Miller: The testimony now showing that the banner was not fastened to the chimney when it was first put up, the testimony is objected to as being irrelevant and immaterial. It is further objected to as being incompetent, irrelevant and immaterial generally to affect the defendant in this issue.

By the Court: As this testimony may throw some light on the question of the alleged negligence of the defendant, I think it is competent for what it may be worth. The objection is, therefore, overruled and an exception noted to defendant.

By Mr. Jones:

Q. You have said you had some conversation with them respecting the use of the chimney?

A. Yes.

Q. What was that conversation?

By Mr. Miller: We further object to the testimony until it is shown with whom the conversation was had.

By Mr. Jones:

Q. With whom did you have that conversation?

A. Terry Johnson.

119 Q. What was that conversation?

A. I asked him what he was going to do, and he said he was going to fly a banner across there. I asked him what he was going to tie to, and he said he didn't know yet, a fastener of some kind, and he said he had a notion to tie to the flue. I said it would be an unsafe place to tie to, for he told me it was going to be a good, big banner. I hadn't seen the banner yet. I told him it would be a bad place to tie to, I didn't think it would stand the strain of that. I further told him the flashing came up and was bent into the flue. That was about the extent of our conversation.

Q. Did you see the banner after it was suspended across the street?

A. I did.

Q. How long after your conversation with Terry Johnston on the roof of the hotel was that?

A. It might have been the same evening or it might have been the next day. I don't know when it was. The next time I came past, I saw the banner swinging across the street for the first time.

Q. From where?

A. From the street.

Q. Did you later see where the banner was fastened from the side of the Commercial hotel?

A. I did.

Q. From where did you see that fastening?

A. From Hibner & Hoover's tinshop.

Q. The same place where Mr. Taylor and Mr. Breon worked?

A. Yes, sir.

Q. Where was the fastening when you saw it first?

A. Around the flue.

120 Q. Around the flue?

A. Yes, sir.

Q. Whereabouts around the flue was that fastening?

A. I should judge about 18 inches above the roof pretty close to the center of the chimney.

Q. Was it above the flashing?

A. It was.

Q. About how high above the flashing?

A. Probably a foot, to the best of my knowledge.

Q. How long after your conversation with Terry Johnston on the roof of the Commercial hotel was it that you first saw the fastening from Hibner & Hoover's shop?

A. Well, I couldn't say. It was three or four days probably afterwards.

Q. Three or four days?

A. Something like that.

Q. Did you observe that chimney when you were on the roof?

A. I did.

Q. What was the character of its construction?

A. It was what they call a 21 inch square flue; it is two and a half brick square.

Q. On the side?

A. Yes, sir.

Q. How thick was it?

A. Four inches, one brick.

Q. And how high was it?

A. I couldn't say. Approximately it would be about  $3\frac{1}{2}$  or 3 feet; something like that.

Q. And was it uniform in its width, the whole way up?

A. No, it was not.

121 Q. What was the design of it?

A. On top there was two bricks that had been broken in two, and set on top of the other, then a big cement cap that stood on top of it, or a stone cap; I don't know which that was, whether stone or cement.

Q. Was it wider at the top than it was at the bottom, or not—the chimney?

A. This cap piece stuck out over a little.

Q. What did these corner posts of brick rest on?

A. On the top of the other bricks, the corner bricks.

Q. Then the corner bricks upon which they rested were out about the same width as the cap; is that correct?

A. No, the cap stuck out over this way (indicating).

Q. Over further than the corner bricks?

A. Yes.

Q. Was the top course of the bricks wider than the bottom of the chimney, or not?

A. To the best of my knowledge, they were not.

Q. What was the character of that cleat that you saw there?

A. I don't really recollect what it was, it is so long ago. It was an iron cleat of some kind; it had an end turned up on it.

Q. Did you perform any services for Johnston or not, with respect to making the fastening there at the chimney?

By Mr. Miller: When do you propose to show that?

122 By Mr. Jones: At the time he was up there.

A. I really don't know just how. I have forgotten. I think I did, though.

By Mr. Jones:

Q. Do you remember of the chimney coming down?

A. I do.

Q. Were you in Dubois at that time?

A. I was.

Q. How often did you see, or did you see the banner from the time you first saw the fastening? I mean did you see the fastening from the first time you saw it at Hibner & Hoover's, did you see it at any time from that up to the day the chimney came down.

A. I don't quite understand your question.

Q. Did you see the fastening any time between the first time you saw it, and the time the chimney came down?

A. I only seen it the once.

Q. Just the once?

A. Yes, sir.

Q. You were in Hibner & Hoover's hardware store and saw it from there, just the once between the time that you have been on the roof talking to Johnston, and the time the banner and chimney came down?

A. I am certain of the once. I may have seen it more.

Q. How many days before the banner came down with the chimney, was it that you saw that fastening from Hibner & Hoover's?

A. I don't recollect now.

123 Q. Was it during the same week?

By Mr. Miller: I submit that the witness has said he doesn't know.

By Mr. Jones:

Q. How was the banner fastened to the chimney that is, the cable to which the banner was suspended, how was that fastening made about the chimney?

A. There was two loops came around the chimney and the other end, I don't know whether it was tied to the other end of the flue; I didn't observe how it was fastened, only it took the two loops around the flue.

Q. And was it the two loops around the flue, the cable that you speak of as the fastening that was above the flashing?

A. Yes, sir.

Q. Did you see this cable after the banner had been blown down—the chimney came down?

A. I did not.

Cross-examination.

By Mr. Miller:

Q. What date of the month was it that you were on the roof there and talked to T. W. Johnston?

A. I do not know.

Q. Do you know what day of the week it was?

A. I do not.

124 Q. You say that T. W. Johnston was there, and one other man?

A. Yes, sir.

Q. Do you know who that other man was?

A. Positively not.

Q. Did you know Edgar Doud?

A. I couldn't say. I know a couple of Doud boys, but I don't know one from the other.

Q. Do you know one of them called Peggy Doud?

A. They are all Douds to me. I don't know what their names are.

Q. Did you see Vernon Johnston there that day?

A. I did not.

Q. Did you see H. B. Johnston there?

A. I did not.

Q. Then at this time there were only two men there, and one of them was T. W. Johnston?

A. Terrence Johnston, yes, sir.

Q. And neither Vernon Johnston nor H. B. Johnston were there?

A. To the best of my recollection, they were not.

Q. And this was before they had strung the banner at all?

A. It was.

Q. You didn't see the banner that day?

A. Well, I may have seen it in the evening across the street, but not at the time they were there.

Q. And at that time you did see this iron strap, or cleat that they had on the roof?

A. I did.

Q. Was it fastened down to the roof when you saw it?

A. It was not.

125 Q. And they were only discussing then where they would make the first fastening for the banner?

A. I would suppose so.

Q. And the banner had not been attached to anything on the Commercial hotel at that time?

A. It had not.

Q. While you were there was the banner attached to anything?

A. It was not.

Q. Was there anything done with this iron cleat while you were there?

A. To the best of my knowledge, there was not.

Q. Did anybody else come there before you left the roof, except these two men?

A. Two men I had with me.

Q. I mean anybody working in connection with the banner.

A. Not to my knowledge, no, sir.

Q. Where did you go after this conversation? Did you leave the roof?

A. I couldn't say whether I did or not.

Q. Were you there when the banner was actually attached on the hotel building?

A. When they actually attached it you mean?

Q. Yes?

A. No, sir, I was not.

Q. You don't know how the attachment was made that day?

A. Positively not.

Q. You can't tell whether it was attached to this cleat on the roof, or whether it was fastened to the chimney?

A. No, sir.

Q. Do you know what kind of a rope or cable was being  
126 used that day in connection with this banner?

A. I do not.

Q. Did you see the rope or cable that day?

A. The only I seen, they had a line stretched adross the street, and it was hard to tell what they were going to do with that.

Q. What was this line—the line supporting the banner?

A. No, sir. I hadn't seen no banner yet.

Q. Do you know either of your own knowledge or from report, that the end of the rope or cable at first was attached into this iron cleat?

A. Only from hearsay.

Q. What did you hear about it?

By Mr. Miller: That is objected to.

(Question withdrawn.)

By Mr. Jones:

Q. Do you know the banner came loose at that end, after having been first attached there?

A. No, sir; I do not.

Q. Do you know whether or not the banner was afterwards re-attached on the hotel building?

A. No, I don't.

Q. You were on the roof just once while there was any work being done in connection with this banner?

A. To observe them, I guess it was only the once. I was working all around there.

127 Q. What do you say you were working at?

A. Working at the stack there.

Q. What kind of a stack was this?

A. I don't know whether it was the iron stack or the brick stack.

Q. Weren't you razing the iron stack that day?

A. Perhaps I was.

Q. What was this iron stack that you were razing?

A. A stack off the furnace.

Q. How high was that stack?

A. In the neighborhood of 60 or 70 feet; something like that.

Q. What was its diameter?

A. Well, I couldn't say positively. Two feet, two and a-half feet.



Q. And that was an iron stack, then, 60 or 70 feet high?

A. Yes, sir.

Q. How high above the roof did it extend?

A. Twenty feet, probably; maybe a little more.

Q. How long did you work at that?

A. It is hard to tell.

Q. What is your recollection now?

A. I have no recollection at all on it now.

Q. Did you raise it off the foundation on which it rested?

A. I did.

Q. How high did you raise it?

A. Well, I raised it up a just kept cutting off. I raised it up high en-ugh to cut two sections out.

Q. While you were having that stack raised up that way, did you stay it up at the top by guy wires?

A. I didn't do no setting to it. It was already stayed.

128 Q. Didn't you stay it while you were working at it yourself?

A. The guys were already on it. I had nothing to do with putting the guys on.

Q. Did you put any guys on it at all then?

A. I did not. The guys were already on.

Q. How many guy wires were fastened to it?

A. I think there was four. I wouldn't say certain. Probably only three.

Q. What were those guy wires fastened to at the other end?

A. I think one was fastened on the skylight, the other around the soil pipe.

Q. Weren't they fastened around the chimney there?

A. One was fastened around the chimney; perhaps two of them.

Q. Did you observe those fastenings around the chimneys?

A. I did.

Q. Where were they fastened with reference to the flashings?

A. The one I put on, I left it right back where I got it, around the flashing.

Q. Then you did guy one there while you were working at the iron stack?

A. Any more than this that was already there.

Q. When you put up the brick flue, did you guy it to anything?

A. Yes, there was a couple of temporary guys put on that, until I got it set up.

Q. What did you guy those wires to?

A. I don't know now.

129 Q. Don't you know that you guyed them to flues on that roof?

A. I told you a little bit ago I tied one to the flue.

Q. Didn't you tie more than one to the flue?

A. I said perhaps two.

Q. Where did you tie those?

A. The one that pulled off the roof I tied right down next the roof, where I found it, and the other was tied on a quarter chimney,

right in this areaway, put down through, and I put an iron behind that, for I kicked on putting that fastening back on there.

Q. Didn't you guy those to the chimneys above the flashing?

A. This one, yes.

Q. And didn't you take out the mortar in between the brick, so that your guy wire would hold on to the brick?

A. I don't know as I did.

Q. What do you say now?

A. I say I don't remember.

Q. What kind of cables did you use for this guy?

A. Wire cables.

Q. Those flues you used were the same size of flue that was used for attaching this banner to, were they not?

A. I don't know as they were. I couldn't say.

Q. You saw those flues, didn't you?

A. Perhaps I did.

Q. How many flues did you see there?

A. I don't know.

Q. What is your best recollection as to being the same kind of a flue that this was?

A. Well, I judge it ought to be the same. I don't know as it was. They all stood along the street.

130 Q. They all looked alike, didn't they?

A. To the best of my knowledge, they did.

Q. Now, you say you guyed one of these wire cables to one of those flues by taking out the mortar between the bricks above the flashing, and fastening that wire in between the bricks?

A. I didn't say anything about taking out mortar.

Q. What did you do?

A. I said I put it around the flue.

Q. Whereabouts?

A. The one on the roof I put a piece of iron down around the flashing. The one on this corner I put an iron behind, for I objected to tying there.

Q. Did you at either of those flues fasten the wire in between the brick and the mortar joint above the flashing?

A. Not to my knowledge, no, sir.

Q. You testified here in the former trial of this case?

A. Yes, sir.

Q. Did you testify in answer to this question, "Didn't you anchor that 65 foot stack with wire ropes around exactly the same kind of flues? A. I did, only the pull was a different way; it didn't pull out on the straight." Did you so testify?

A. Yes, sir; I did.

Q. Then what do you mean to testify now, that you did or did not anchor this stack around the same kind of flues?

A. I said maybe the same kind of flue, and it may not have been. Approximately, it was likely the same flue.

131 Redirect examination.

By Mr. Jones:

Q. Will you just explain the effect of your tying to the flue there?

By Mr. Miller: That is objected to.

By the Court: The whole thing is incompetent and irrelevant except as bearing on the plausibility of his advice. The difficulty is it raises a collateral issue and would require a full examination as to the circumstances that surrounded the supporting of the stack.

By Mr. Jones:

Q. What do you mean by the pull being a different way, where you fastened to the chimney?

By Mr. Miller: Objected to as irrelevant and immaterial.

By the Court: I will let that be answered, inasmuch as this has been brought out on cross-examination.

A. The pull was down this way (indicating). If it had pulled that flue, it would have pulled it over the roof, it wouldn't pull it out in the street.

Q. The height of this stack, 60 to 70 feet, was from where—from the ground or the roof?

132 A. From the ground.

Q. So that the stack that was guyed was how many feet above the roof?

Objected to.

(Question withdrawn.)

Q. Did you have anything to do with the chimney? Did you make any fastening to the chimney to which the banner was fastened?

A. I did not.

133 *Testimony of W. H. Sober.*

W. H. SOBER, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. Where do you live?

A. Dubois.

Q. How long have you lived there?

A. Over thirty-five or forty years. I think about thirty-nine years.

Q. What is your occupation?

A. I have been a builder, contracting builder.

Q. For how long?

A. I have been in business about thirty or thirty-five years; something like that.

Q. Did you see the banner flown across Long avenue in Dubois in October, 1912, from the Commercial Hotel?

A. Yes.

Q. Did you see how that banner was fastened on the side of the Commercial Hotel?

A. Well, I did; yes, I did. I seen how it was fastened.

Q. Where did you see it from?

A. From Hibner & Hoover's hardware store, on the top story.

134 Q. How was it fastened about the chimney?

A. I couldn't say exactly. I know it was around the chimney, that was all. A wire cable there, if I remember right. I couldn't say exactly, but it was fastened around the chimney.

Q. How high up on the chimney was it fastened?

A. I couldn't say. It was quite a little distance. It looked like 12 or 14 inches. I couldn't tell; I wasn't that close to it. I was 50 or 60 feet away, maybe further.

Q. What experience have you had in brick work?

A. I have done a great deal of brick work in my time.

Q. Can you say from your knowledge and experience in brick work, as a builder, whether or not a chimney of the character that has been described here, a one brick thick chimney, about 35 inches high, 3 to 3½ feet high, made of brick and lime mortar, flashed in about the bottom with tin flashing, would be a safe place to which to tie the banner that was tied to it?

By Mr. Miller: Objected to as incompetent, irrelevant and immaterial, and not being the subject of expert testimony.

By the Court: I think the difficulty with this question is that it asks that a conclusion be drawn by the witness, which is really a conclusion to be drawn by the jury from all the facts and circumstances in connection with the chimney, its construction, location, and strain that may be put upon it by the banner in question. The objection is, therefore, sustained.

135 Cross-examination.

By Mr. Miller:

Q. How long had this banner been up before you saw it from Hibner & Hoover's hardware store?

A. I couldn't say.

Q. It had been up for some time before that?

A. A day or two. It had only been up a day or so.

Q. How far were you away from this flue when you saw it?

A. I suppose 60 feet. I wouldn't say how far exactly. Whatever width the Commercial is. I think it is about sixty feet, or something like that.

Q. And as I understand it, you simply observed this by looking out of the window of Hibner & Hoover's store?

A. I knew it was fastened to the chimney. My son told me, in the first place, it was fastened there.

Q. I say, you simply observed it by looking from the window?

A. Yes.

Q. Over across to the chimney?

A. Yes.

Q. You were there just the once?

A. Yes, I was just up once looking at it.

Q. Could you see the flashing on the flue at that time?

A. I couldn't say that you could. It was rather higher, it appeared, than the flashing, but I wouldn't swear positively about that. At that distance you couldn't tell.

136 Q. You wouldn't swear now that the cable was above the flashing, or not?

A. No.

Q. And you couldn't see distinctly enough to see where the flashing ended on the flue, from where you stood?

A. No, I couldn't hardly tell. The flashing didn't appear to be as high as the rope, but I couldn't hardly swear to it.

Q. From your observation and from your ability to see, you couldn't tell whether the cable was above or around the flashing?

A. No, I couldn't say.

Q. And you don't know where the cable was placed, when it was first placed around the flue?

A. No, I don't know where it was first placed.

Redirect examination.

By Mr. Jones:

Q. Was the matter of fastening about the chimney a subject of discussion between you and your son?

By Mr. Miller: Objected to as irrelevant and immaterial.

By the Court: Unless it would tend to call his attention to its location; something of that kind; not the conversation itself.

137 By Mr. Jones: I desire to offer the testimony of Vernon

W. Pancoast, plaintiff, who was sworn in his own behalf in the former trial of this suit.

The testimony of Vernon W. Pancoast read in evidence to the Jury as follows:

*Testimony of Vernon W. Pancoast.*

VERNON W. PANCOAST, plaintiff, having been duly sworn in his own behalf, testified as follows:

Direct examination.

By Mr. Jones:

Q. What is your full name?

A. Vernon W. Pancoast.

Q. You are the plaintiff in this action?

A. Yes, sir.

Q. How old are you, Mr. Pancoast?

A. Forty-five.

Q. Where do you reside?

A. Alden, New York.

Q. How long have you lived there?

A. About thirteen years.

Q. Has your residence in Alden, N. Y., been continuous during the last thirteen years?

A. Yes.

138 Q. Where were you on October 12, 1912?

A. In Dubois, Pennsylvania.

Q. Did any injury befall you in Dubois on October 12th, 1912?

A. Yes, sir.

Q. State what occurred on that date in Dubois, Pennsylvania, inflicting this injury which you say you received?

A. I was standing on the pavement near the Hotel Commercial, about two or three feet from the curb, between half past four and five. At that time some men on the street hollered, "Look out." I looked up in the air, and all I could see was the banner coming down and a lot of brick, and as I looked up everything got black.

Q. Do you know what happened to you?

A. Not at that time.

Q. You saw a banner and bricks coming through the air?

A. Yes.

Q. From where were those bricks coming, if you know?

A. Over the edge of the hotel eaves.

Q. Along the side of the hotel?

A. Yes, sir.

Q. Do you know whether or not any of these bricks hit you?

A. I did afterwards.

Q. Where did you find yourself first after things got black?

A. In the hotel lobby.

Q. How long was that after the time you were standing on the sidewalk?

A. Perhaps two minutes.

139 Q. How had you gotten into the hotel lobby?

A. My brother and a motorman, I think, took me in, carried me in.

Q. Where was your brother at the time that you were standing on the sidewalk.

A. Standing about two feet away from me on the left side.

Q. What was done with you after you were taken into the hotel lobby?

A. I came to, and told them to take me to my room.

Q. Did you have a room at this hotel?

A. Yes, sir.

Q. Were you taken to your room?

A. Yes, sir.

Q. What was done to you there, if anything, by way of medical treatment?

A. My brother took several towels to wrap around my head, to catch the blood, and they sent for Dr. Sullivan.

Q. What was the condition of your head at this time?

A. It was quite numb.

Q. Was it injured, fractured or contused in any manner?

A. I didn't know at that time. I thought it was perhaps just a scalp wound. It was bleeding quite profusely, until the doctor got there. He said I would have to go to the hospital for an operation.

Q. Who was this doctor?

A. Dr. Sullivan.

Q. Were you taken to the hospital?

A. Yes, sir.

Q. When—that same day?

A. Within a few minutes.

140 Q. Were you operated on at the hospital?

A. Right away.

Q. What were you operated on for at the hospital?

A. A fractured skull; a piece of the skull was broken off and driven down into my brain. I say, the skull had broken off and was driven down into the brain about an inch or an inch and a quarter.

Q. Was that what you were operated on for there in the hospital?

A. Yes, sir.

Q. What other injuries did you have, aside from this injury to your skull and brain?

A. A gash over my right eye. A brick hit me on the right shoulder, and my foot was smashed and the bone broken.

Q. What was the condition of your health prior to the date of this injury you received?

A. Excellent.

Q. How long were you in the hospital?

A. Three weeks and two days.

Q. Then where were you taken?

A. They took me over to the hotel for about ten days.

Q. To the hotel in Dubois?

A. Yes, sir.

Q. To the hotel at which you had your room?

A. Yes.

Q. Then where were you taken?

A. I went to my mother's at Olean, about half way to my former home, and stayed there about another ten days, a week or ten days.

Q. At your mother's in Olean?

A. Yes; until I was able to go further to my own home.

141 Q. Then where did you go from Olean?

A. To Alden.

Q. That is the town of your residence?

A. Yes, sir.

Q. Alden, New York?

A. Yes, sir.



Q. Did you suffer any pain or undergo any special suffering on account of this injury, at the time you received it?

A. My shoulder was badly bruised and my foot, but I didn't feel any pain in my head because it was numb.

Q. What has been the condition of your head since the accident?

A. I have a headache most of the time, kind of a pain, and I can't think.

Q. A headache most of the time?

A. A dull pain in my head.

Q. Where is that pain?

A. Right here, all the way around.

Q. What is the character of that sensation of pain? Is there anything in particular that you could liken it to?

A. It appears like an iron band drawn tightly around here.

Q. Are you able to think as well now as you were prior to the injury received to you- brain?

A. No, sir; I can't even do any figuring.

Q. How is your memory since this injury?

A. Bad.

Q. Where is this injury to your head or skull?

(The witness indicates the left central portion of the skull.)

142 Q. Is there a plate in your head?

A. No, sir.

Q. What is there there covering your brain?

A. Nothing except the skin.

Q. How large is that hole in your skull?

A. I think half a dollar will just about cover it.

Q. What is the tendency of your brain at that portion of the skull, if you lie on that side of your head?

A. It protrudes. In the morning I have kind of a hernia.

Q. You have a hernia in the morning, if you lie on that side of your head?

A. Anywhere. As soon as I lie down it starts.

Q. Do you experience any particular difficulty if you turn your head to the right side or let it remain there for any length of time?

A. This cord is paralyzed. If I keep this way a few minutes it sets.

Q. How do you get your head back to a straight-forward position?

A. Pull it back with my left hand.

Q. Is your arm paralyzed, or not?

By Mr. Cole: I suggest he let the witness describe his condition rather than take it up in detail.

By the Court: I think that suggestion is all right. Ask him if there is any other part of his body that he has any inconvenience with.

143 By Mr. Jones:

Q. What other inconveniences, if any, do you suffer since you received this injury? State them fully.

A. My salivary gland is paralyzed so I can hardly talk. My mouth is dry all the time, and the gland in my stomach has been paralyzed.

Q. You speak of a sensation of dryness in your mouth?

A. Yes, sir.

Q. Describe fully the extent of that sensation?

A. I can hardly eat anything dry, like bread or cake; my mouth is dry, and it is so dry I can hardly speak sometimes. It is dry now, in fact, and it is that way all the time.

Q. Has your speech suffered any or been impaired any since this accident?

A. Formerly I could talk all right. Of course, now I can't very good.

Q. What difficulty do you experience in your articulation?

A. It is hard to get a good many words out.

Q. In what way? Just illustrate if you can?

A. I can't articulate anything with s-s and c-s in. It is hard to pronounce them. If I get tired I can't hardly talk at all.

Q. How are you if you become the least bit excited?

A. I got to faint; I can't say a word.

Q. Was that true before your injury?

A. No, sir.

Q. Do you have the full, free, muscular use of your tongue?

A. I should think so.

144 Q. How does your tongue feel,—the same now as it did before the accident?

A. It feels all right, but I can't articulate.

Q. What has been the condition of your teeth since this accident?

A. I have lost eight since last fall, and half are loose now.

Q. Are they all that way?

A. All but perhaps half a dozen.

Q. Do you have the free use of your right arm since this accident?

By Mr. Cole: I make the suggestion that you ask the witness to describe his physical condition.

By the Court: That is objectionable. You can ask him if there are any other, or you can say, "I notice you supported your right arm when you took the oath. What was the occasion for that?"

By Mr. Jones:

Q. What was the occasion of your supporting your right arm with your left, when you took the oath?

A. I couldn't raise it. I can't keep it there without supporting it.

Q. Try to raise it.

(Witness indicates.)

Q. Do you have the use of your hand, the full use of your right hand?

A. Very little.

145 Q. Could you take hold of that glass? Try it?

(Witness takes up glass with both hands.)

Q. Now can you put it down?

(Witness loosens fingers of right hand with left hand.)

Q. What is the occasion of your ungripping your fingers of your right hand with your left?

A. I haven't the strength to grip with those fingers.

Q. You can't work the fingers?

A. Not open like that.

Q. To what extent can you work the fingers of your right hand?

A. If I do a few times, they shut up tight, and I can't open that index finger now.

Q. Did you have the full use of your right hand and arm prior to this accident?

A. Yes, sir.

Q. Did you receive any other injuries at that time to your body, other than you have described?

A. My body was badly bruised by bricks and pieces of mortar.

Q. I believe you stated that your right foot was fractured?

A. One of the bones was broken.

Q. In your right foot?

A. Yes.

Q. Are you able to pick up small objects with your right hand?

A. Not very well.

Q. Will you endeavor to pick up that? (Indicating a small pellet.)

146 A. Those two fingers don't seem to open together and match.

Q. Do you have the use of those two fingers; that is, the conscious use of them?

A. I can't do it without seeing it.

Q. You have to see what you are doing?

A. I have no feeling down there at all.

Q. Do you have any feeling in your right arm?

A. From there up (indicating) it is about half feeling, and the other half I feel fairly well, but in my arm down the feeling is all gone.

Q. What has been the condition of your health since the accident?

A. I think it is getting worse. Up to about a year ago last December, I thought I felt better, and from that time I have been getting worse.

Q. Do you suffer any special sickness since this injury?

A. I have been troubled with——

By Mr. Cole: Not unless he can attribute it to this injury. He may have suffered several sicknesses, but he is not competent to attribute it to this injury.

By the Court: Of course, if counsel intends to attribute any sickness that the man may have had since, to this injury, the witness is perhaps not competent to testify about that.

(Question withdrawn).

By Mr. Jones:

Q. Which hand did you usually use prior to this injury?

A. The right hand.

Q. You are a right handed man?

A. Yes.

Q. Did you use your right hand in writing?

A. Yes, sir.

Q. Have you been able to use it at all in writing since?

A. I can't even hold a pencil.

Q. What had your business been prior to the time of receiving this injury?

A. Manufacturing glass bottles.

Q. Where did you have your manufactory?

A. Alden, New York.

Q. How long were you in the business of manufacturing glass bottles?

A. For myself, twelve years.

Q. How many men were you employing in your factory at Alden, New York?

A. The last year, 130.

Q. That is not this last year——

A. The last year that I operated up there.

Q. What year was that?

A. The year closed on July 31st, 1912.

Q. Your plant has not been running since before the accident?

Object to.

(Question withdrawn).

Q. What year did you say was the last year you ran?

By the Court: He has already said the summer of 1912, July, 1912.

By Mr. Jones:

Q. What was the gross amount of the sales of that business in Alden, New York?

Objected to as immaterial and irrelevant.

By Mr. Jones: This is offered for the purpose of showing the capacity of this man for this particular line of business. He was not a salaried man; he owned his own business.

By the Court: You can ask him how large a factory he had, how many pots he had, how often it was continuous and what his annual output was, not as to gross sales because that is a matter that depends on the fancy of the public.

By Mr. Jones:

Q. How many men did you say you had employed at your factory at Alden?

A. 130.

Q. What was the size of your factory in Alden, New York?

A. We had three tanks, three continuous tanks.

Q. Those are glass tanks?

A. Yes; three colors of glass.

Q. How large a factory was it.

A. Do you mean in size?

149 Q. Yes?

A. The dimensions?

Q. Yes.

A. The factory part itself 90 by 70; the packing house 50 by 84, and the connecting buildings over the lehrs, a large warehouse, barn and batch room; the batch room 30 by 40. We turned out about two cars a day?

Q. Of what?

A. Bottles.

Q. What did you do about that factory? What were you occupying yourself at about that factory?

A. I did most of the selling, part of the office work and the management.

Q. Where did you get the funds for living expenses during the time you had your glass factory in Alden, New York?

By Mr. Gleason: Objected to as immaterial and irrelevant.

Objection sustained.

Exception noted for plaintiff.

Q. What could a man of your attainments and capacity in the management and running of a glass business, command as a salary, if he hired his services to some one?

A. It is all according to what the work was.

Q. In answering that question, take a similar condition to your factory there. A man who would manage a factory of the  
150 extent of yours, what would his services be worth?

A. Most managers get about two thousand dollars a year, and they do no office work when selling; and a man to do all these three things should get at least five thousand dollars a year.

Q. Were your services to yourself in your factory at Alden, worth five thousand dollars?

Objected to.

Objection sustained.

Q. What would it cost you to have put a man in your factory at Alden, New York, that would have performed the same services as you were performing?

A. I don't know where I would get one to do it all.

Q. But if you could?

A. You would have to have at least a couple of men to do that work.

Q. If you could have got a man, what would it have cost you?

By Mr. Cole: Objected to because the witness has disqualified himself to speak on that. He has stated what services of that kind were worth. Now I think that is as far as he can go.

Objection sustained.

By Mr. Jones:

Q. Were you put to any expense for medical attention and hospital bills, and so forth, on account of your injury?

A. Yes, sir.

151 Q. What were those expense-, do you know?

By the Court: Let him give them in the aggregate, as near as he can estimate it.

A. That would be including my wife coming down to see me, and her board?

By Mr. Jones:

Q. No?

By the Court: The natural and reasonable expenses.

By Mr. Jones:

Q. Hospital and doctors, and so forth, medicines, any extra care you were required to have when you traveled home; just in the aggregate.

A. About \$300 at that time.

Q. What expenses, if any, did you have later?

By Mr. Cole: I don't think that is claimed for in this statement.

By the Court: The statement covers all the expenses up to the time of trial, or up to the time the suit was brought.

By Mr. Jones:

Q. What other expenses did you have later?

A. It cost at least ten dollars a week lately——

152 By Mr. Cole: Not since last January. Any time prior to January, 1915.

A. I was going to an osteopath——

By Mr. Jones:

Q. What was your expense in the aggregate up to that time, in round figures, up to January of this year?

A. I should say \$500.

By the Court:

Q. Is that in addition to the \$300?

A. Yes, sir.

Cross-examination.

By Mr. Cole:

Q. You don't know of your own knowledge, except what you learned afterwards, how this accident happened, do you?

A. What I heard later is all.

Q. What were you doing at the time the accident happened—just standing on the sidewalk?

A. My brother and I were standing there waiting on another party.

Q. How long had you been there, standing on the sidewalk?

A. Perhaps fifteen minutes.

153 Q. And you were waiting to see another party?

A. Yes, sir.

Q. And all you know about it is you saw a banner coming down. What kind of a banner was that?

A. I think a Taft banner.

Q. A political banner, wasn't it? It was during the presidential campaign?

A. Yes.

Q. Had you seen that banner before?

A. I think one or two days before.

Q. It was stretched across the street, wasn't it?

A. Yes, sir.

Q. And had the portraits of the Republican candidates on?

A. I think so.

Q. And that was the banner that fell, and at the same time you say there was some bricks fell?

A. The air was full of brick and mortar as it came down over the edge of the building.

Q. Do you remember of your foot being struck?

A. Not at that time, until I came too.

Q. All you remember is that something happened, and then you were unconscious?

A. All of a sudden a flash, and then it was gone.

Q. Going back to your business before you were injured. You say that a manager of a factory like that could be employed for two thousand dollars a year?

A. Just as manager.

Q. And because you performed some business duties and acted a salesman, it increased your services so that they were worth five thousand dollars?

A. I should think so.

154 Q. Now, do you of your own knowledge, know of any man being employed that received \$5,000 for performing the kind of services that you performed?



By Mr. Jones: Objected to as immaterial.

By the Court: It is cross-examination. It bears on his knowledge of what they are worth. I think it is proper.

A. I know several places down in New Jersey that pay those kind of prices for a man who would do that kind of work.

By Mr. Cole:

Q. And you could hire men to do the same kind of work you were doing. Now, what place did you know of a man being paid \$5,000 a year for his services, around a glass bottle factory?

A. One down at Bristol, New Jersey.

Q. What factory?

A. The Cumberland.

Q. Who was the man?

A. His name was Shoemaker.

Q. What were his duties?

A. To oversee the plant and go on the road.

Q. You performed all the duties that he performed?

A. About the same.

Q. This factory, while you say it was a large factory, one man was able to manage it and to make the sales and do a part of the office work, was he?

A. Yes, sir.

155 Q. After this accident you proceeded to construct another glass factory, didn't you?

A. Formed a new company and the company did that.

Q. Was this a corporation at Alden?

A. No, sir.

Q. Just you owned it, individually?

A. I was proprietor.

Q. Did you own it individually or did somebody else have a joint interest with you?

A. I owned it myself.

Q. After that when you proceeded to form a corporation and built another glass factory that was very much larger than that one, didn't you?

A. Yes.

Q. And you operated it for some considerable time?

A. Nearly a year.

Redirect examination.

By Mr. Jones:

Q. Were you alone in this other glass factory that Mr. Cole speaks about?

A. The new one?

Q. Yes?

A. No, sir.

Q. Who was associated with you?

A. A man named Hatton and my brother.

Q. What did you do in the matter of managing or looking after that factory, after your injury?

156 A. We had a manager to do that kind of work.

Q. What did you do?

A. I couldn't do much of anything but walk around.

Q. What have you been able to earn since the injury your received?

A. Nothing.

Q. Have you been able to work?

A. No, sir.

Recross-examination.

By Mr. Cole:

Q. You did pursue your duties in this new factory for substantially a year, didn't you?

A. I didn't call them duties. I was walking around. My brother and the other man did the regular work.

Q. What position did you hold—president?

A. I was president.

Q. And had the title also of general manager and overseer, didn't you?

A. No, sir.

Q. Who had that title?

A. Didn't have that title.

Q. Didn't have any such a man?

A. No, sir.

157 By Mr. Jones: I offer in evidence the testimony of T. H. Pancoast, a witness called on behalf of the plaintiff in the former trial of this case.

The testimony of T. H. Pancoast was read to the Jury as follows:

*Testimony of T. H. Pancoast.*

T. H. PANCOAST, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Cole:

Q. Where is your home?

A. Lambertville, New Jersey.

Q. How long have you lived there?

A. Between three and four years.

Q. Are you a brother of Vernon W. Pancoast, the plaintiff?

A. I am.

Q. State if you know where he was living and has been living for the last five or six years?

A. Alden, New York.

Q. Have you been at his house?

A. I have.

Q. State whether he has a home and family there?

A. He has.

158 Q. What is the character of his family?

A. A wife and no children.

Q. Has he for the last three years at lease kept that house open and lived there?

A. He has.

Q. State if you were with him at the time this accident happened?

A. I was.

Q. Whereabouts were you standing, the two of you?

A. I was standing on his left side, along the gutter on the Long avenue side of the Commercial hotel.

Q. Between the hotel and what building opposite?

A. Across the street?

Q. Yes?

A. The Deposit National Bank building.

Q. How close were you to the curb, what you call the gutter?

A. Within a foot.

Q. Was that a sidewalk?

A. It was.

Q. A footwalk?

A. Yes.

Q. State if that is one of the public streets of Dubois borough?

A. I understand it to be the principal street of Dubois borough.

Q. Have you observed it?

A. I have.

Q. State whether it is used by the public as a public street.

A. It is.

159 Q. Where is the principal part of the town, the center, the business center?

A. Long avenue and Brady street.

Q. That is the street crossing there?

A. Yes.

Q. How far were you from the street crossing?

A. I should estimate about fifteen feet from the corner.

Q. Just state what happened?

A. We were standing there conversing, on this spot, when I heard an outcry from across the street, "Look out." I turned my head to the right and saw this banner coming down towards us. I grabbed my brother by the left arm with my right hand, and hollered "Run," and started towards the middle of the street. I hadn't taken but one step when one of these bricks hit me on the right arm, contusing my right arm and tore my coat and underclothing. I continued on towards the middle of the street, when my hold was broken on his arm, until I reached about the middle of the street car track. Then I heard no more of the bricks falling on the pave-

ment and I turned around and my brother was lying in the gutter, face down, with this gaping wound in his head and bleeding in several places on his face. I rushed over and picked him up and turned him over, and by that time one or two other men were there, and I asked them to help me carry him into the hotel. We took him in and sat him down on the floor, preparatory to taking him up to his room, or getting a doctor. I asked the clerk to get a doctor as quick as he could. He said, "Give me a drink." I got him a glass of water, and I asked him what he wanted to do, take him directly to the hospital or upstairs to his room. He suggested we go upstairs, and so we picked him up and carried him to our room.

Q. Was he able to handle himself, to walk, move around?

A. No. He thought he was, but we carried him.

Q. When you picked him up was he conscious or not?

A. Yes; at least, I thought so.

Q. How long did he stay in the hotel before he was taken to the hospital?

A. From half to three-quarters of an hour.

Q. How long was he in the hospital?

A. To the best of my recollection, over two weeks; between two and three weeks.

Q. Then what did he do?

A. Then he was removed to the hotel, and was there in the neighborhood of ten days or two weeks. Then he insisted on going home. His wife started with him in easy stages and got as far as Olean, where they stayed a short time, and then they took him on to Alden, New York.

Q. How long before he came back to Dubois?

A. I don't recall that; I should think it was a month, or more.

Q. Before this accident what was your brother's physical and mental condition?

A. Outside of this slight lameness, which he told me was *myovitis* of the knee joint, he was mostly all right. He did the office work and was capable of doing laboring work; I was at the factory at times when he would take a truck and help to load cars, lift boxes weighing 150 to 200 pounds.

Q. Was that so down until the time of this accident? Was that his condition?

161 A. So far as I know. The last I saw him when he was doing this work was in August prior to the accident; he was loading cars at that time and helping around the packing house.

Q. How long has he been in the glass bottle business?

A. Since about 1888.

Q. What part of the business was he familiar with?

A. Every detail of the business.

Q. How about the planning and construction of a factory?

A. He understood that thoroughly.

Q. How about the manufacturing of glass and the selling of it?

A. He understood all those details.

Q. Where had he worked, in what factories?

A. He was connected with the Olean Glass Company, at Olean, New York; had learned the glass bottle blowing trade at that point. From there he was sent to our plant at Port Allegheny, where he had charge of that branch plant, employing 125 to 200 people.

Q. Where did he go from there?

A. From there he sold his stock in the Olean Glass Company and started for himself at Alden, New York.

Q. How long did he run that business?

A. About twelve years.

Q. How large a business was that when he started?

A. There wasn't any business when started.

Q. How did he start in, on a large or small scale?

A. He started in——

162 By Mr. Mercer: Objected to as incompetent and immaterial and as being too remote.

By the Court: Let him answer. I don't think it is very important. It might even be conceded, for the purposes of this case, that he built up a good business up there.

By Mr. Cole:

A. At the time that this accident happened what was his earning capacity as a glass man?

Objected to as incompetent.

By the Court: I think the form of that question is objectionable.

By Mr. Cole:

Q. What was a man of his acquirements capable of commanding in the market?

Objected to as incompetent.

Objection overruled. Exception noted.

A. About \$5,000 a year.

Q. How long have you been connected with the glass business?

A. As a manufacturer since 1887, and in the business since 1882.

Q. What has been your brother's condition since this accident?

A. It has been deplorable.

163 Q. Explain to the jury what you mean by that?

A. He is a man at the present time who can remember practically very little about the details of the business. One day he will insist one thing is right and the next day he will change the thing all around to something else. He might give orders one day and countermand them all in fifteen minutes, or the next day. I was practically in charge of the factory. *He would I was practically in charge of the factory.* He would start out and discharge some of the best employes we had there, without saying a word to me about it. If I asked him, "What was the matter," he said he didn't want them around. He would go off in a nervous tantrum, had no control over his actions any more than a man demented would.

Q. How is his memory with relation to business matters and keeping the thing straight in his mind?

A. At times it is unseemingly keen; at other times it don't amount to anything.

Q. How is his speech?

A. Very difficult. Sometimes he wants to say a word and he is at a loss to form it; he can't articulate; he can't get the word together. To illustrate, he was trying to tell me about a matter that happened at Ridgway, Pennsylvania, and as near as he could get to that was Bridgway. He transposed the letter "R" to "B." It was a long time before he could explain to me just what he meant.

Q. How long ago was that?

A. That was shortly after the accident, when he commenced to get around.

Q. What is his general condition now in that respect?

164 A. Sometimes that same condition comes back on him now.

Q. State whether he has improved any in the last six months.

A. Not that I can observe.

Q. Does he use his right hand in his business?

A. Not at all that I know of.

Q. About his eating, how does he conduct that?

A. Well, that is pathetic. He doesn't know whether he has had enough or whether he has had too much. I have been with him days when he couldn't tell—he would get up in the morning—he has no sense of hunger; he doesn't know whether he wants anything to eat or not. The only way he can tell when he has no sense of hunger; he doesn't know whether he wants — had too much, he says something sticks in his throat; he has no feeling. He says he can continue to eat and eat.

Q. How is it about missing meals?

A. He would get up in the morning and probably go all day, or he might eat two meals a day or three.

Q. What do you say as to his being able to conduct or manage the same character or class of business that he was before this accident?

A. No chance at all.

Q. What is your age?

A. Forty-seven years.

Q. You are older than your brother?

A. Yes, sir.

Q. About his being able to talk; how is it in the morning compared with the evening?

A. Well, I think there is a slight difference between the morning and the evening. I think he is a little better in the morning, but not so it is hardly noticeable.

165 Q. Under excitement how is it?

A. He just goes all to pieces. He can't form hardly a sentence when he gets excited.

Q. How much have you been with him since the accident?

A. Well, practically continuously up until the latter part of January last.

Q. From that time, when did you next see him—from last January?

A. Until around the first of March; I saw him two or three times during February.

Q. Do you see any improvement in him?

A. None at all.

Q. Where was he when you didn't see him? You say part of the time you didn't see him.

A. He was at Alden, New York.

Cross-examination.

By Mr. Mercer:

Q. Were you the treasurer of the New York Glass Company?

A. I was.

Q. For how long were you at Falls Creek?

A. From the inception of the company until the 17th of January.

Q. When did you first go to Falls Creek?

A. In September.

Q. That is September of 1912?

A. The same year of the accident.

Q. That is September of 1912?

A. Yes.

166 Q. Your brother was there with you at that time?

A. He was.

Q. So you had gone to Falls Creek before he was hurt?

A. Yes.

Q. And you went there for the purpose of building and running a glass plant?

A. Not at first, no.

Q. Didn't you finally go there for the purpose of running that glass plant?

A. We did.

Q. And when you went there you went there with the intention of staying there, did you not?

A. Not necessarily.

Q. Did you go there with the intention of making that your home?

A. No.

Q. Did you intend to stay there as long as the glass business paid?

A. No.

Q. When were you going to quit; when did you intend to leave?

A. Just as soon as I performed my part of the work.

Q. And Vernon was going to stay there and take charge of the thing?

A. Not that I know of.

Q. He owned 55/75; what was he going to do?

A. I couldn't answer that.



Q. Don't you know his intention was to go there and run the business of that company at Falls Creek?

A. I do not.

Q. Didn't you folks in talking this matter over, discuss who was going to stay?

A. It was never discussed that I recall.

167 Q. He had no children in New York?

A. Not that I know of.

Q. When did you start to build the plant at Falls Creek?

A. In December or January of 1912 and 1913.

Q. Your brother, Vernon, was on the ground, on the job at the time?

A. Sometimes he came there.

Q. He even went out at times and sold goods, did he not?

A. He did along towards the later part.

Q. Salesman on the road?

A. No, he wasn't salesman on the road.

Q. He sold goods on the road?

A. He sold, yes.

Q. And he sold goods for the New York Glass Company?

A. Yes.

Q. And the records of your company show it?

A. I don't know as to that.

Q. Who was the secretary of your company?

A. I was.

Q. Who kept the books?

A. Mrs. Steinfeld and a Mr. Mader.

Q. Is Mr. Mader here?

A. I don't know.

Q. Do you know where the books of the company are?

A. I don't.

Q. How much money was paid to Vernon Pancoast as salary by the New York Glass Company?

A. I don't know.

Q. Can you give us about how much?

A. I couldn't.

168 Q. Didn't he receive a salary from the company?

A. I don't recall that there was any mention ever made of salary.

Q. What was your understanding as to how much he was to be paid?

A. I haven't any.

Q. Did anybody have any understanding as to how much of the profits he was to make?

A. I don't know about that.

Q. Were you one of the directors of the company?

A. I was.

Q. How many directors were there?

A. Three.

Q. Who were the others?

A. Walter Hatton.

Q. And Mr. Vernon Pancoast?

A. And myself.

Q. He worked at one time with the Olean Glass Company?

A. He did.

Q. Do you know of his ever having received any salary in excess of \$3,000?

A. I do not.

Q. Then he never did receive a salary of \$5,000?

A. I don't know as to that.

Q. Do you know of any job he ever had that he did receive more than \$3,000?

A. I couldn't answer.

Q. How much did he receive at the Olean Glass Company?

A. I wouldn't say positively, but I think about \$2,500 a year.

Q. The question of his getting \$5,000 a year would depend upon somebody's being willing to give it, would it not?

A. Naturally.

Q. Do you know of any job he could get at \$5,000?

A. When he was all right he could get fifty of them.

Q. Why didn't he get them?

A. He was making more money at his own business.

Q. By reason of the capital he had invested?

A. His business; because he had the business there to do.

Q. He owned the plant at Alden?

A. Yes, as far as I know.

Q. Do you remember of his going to an osteopath in Buffalo, New York, before he was hurt?

A. This last time?

Q. Before this accident?

A. I remember of him going regarding the synovitis in his knee joint.

Q. He limped before he was hurt in Dubois on the 12th of October?

A. Occasionally, he would, yes.

Q. He limped as much then as now?

A. Sometimes more.

Q. So the limping or injury to the right leg was not caused by these brick?

A. Oh, yes, it was. His limping was in his left leg.

Q. Does he limp with his right leg now?

A. Perceptibly.

Q. He limps with both?

A. He drags his right leg after him.

Q. The limp was caused by this synovitis?

A. So the osteopath said.

Q. You noticed the limp before he was hurt in Dubois?

A. Yes.

Q. So that limp was not caused by the accident in Dubois?

A. Not that I know of.

Q. You don't know what Mr. Vernon Pancoast's intentions were with reference to making Falls Creek his home?

A. I never heard him express any intention regarding that.

Q. You never heard him express any intention at all with reference to residence?

A. Not residing there.

Q. Don't you know that when he gave up his business in Alden he was looking for another place to settle?

A. Repeat that.

Q. Don't you know when he gave up his business in Alden he was looking for another place in which to build a glass plant and settle down?

A. He didn't give up his business in Alden until after this matter was consummated at Falls Creek.

Q. Then after he consummated the matter at Falls Creek he intended to leave Alden, New York, and go down there to Falls Creek and run that plant and make it his home?

A. Not that I know of.

Q. But you know that is what he undoubtedly did?

A. I don't know anything of the kind.

171 Q. You know he stayed at Falls Creek?

A. At times, yes.

Q. You know he was at Falls Creek when this suit was brought?

A. No.

Q. Where was he then?

A. I can't answer that.

Q. You know he was running the plant there and was the president of the company at Falls Creek, when this suit was brought?

A. He was president of the company at that time.

Q. And he was on the job there when this suit was brought?

A. No.

Q. Were you there?

A. Yes.

Q. Where was he?

A. I don't know.

Q. He was in New York?

A. I don't know.

Q. After he got that plant started he stayed there and helped you what he could?

A. If you choose to term it that, yes.

Q. He stayed there?

A. No.

Q. He remained there?

A. No.

Q. Where did he go?

A. I can't answer that.

By Mr. Cole:

Q. Did he go back home occasionally?

A. Yes, he went back home, back to Alden; that is where he started for.

172 By Mr. Mercer:

Q. He went back and made visits to his wife?

A. I couldn't answer.

Q. He paid more attention to his business back at Falls Creek than he did to his wife in New York, didn't he?

A. I am sorry I can't answer you the way I would like.

Q. He spent more time in Falls Creek than he did in Alden, New York?

A. I don't think he did.

Q. Were you at Falls Creek all the time?

A. No.

Q. Where were you?

A. I was out getting business.

Q. You were on the road?

A. Part of the time.

Q. Were you on the road all of March, 1913?

A. I don't recall.

Q. You were on the road more than you were at the factory?

A. No, I was on the job more than I was on the road.

Q. What part of the time were you on the road?

A. I couldn't answer that.

173 By Mr. Jones: I offer in evidence the testimony of Dr. J. C. Sullivan, a witness for the plaintiff at the former trial.

Testimony of Dr. J. C. Sullivan read to the Jury as follows:

*Testimony of Dr. J. C. Sullivan.*

Dr. J. C. SULLIVAN, a witness called on behalf of plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. Are you a practicing physician?

A. Yes, sir.

Q. Where do you live?

A. Dubois, Pennsylvania.

Q. How long have you been a practicing physician, Doctor?

A. Twenty-five years past.

Q. Are you a graduate of any medical school?

A. Yes, sir.

Q. What school?

A. The Western University of Pennsylvania.

174 Q. Have you practiced at Dubois continuously since your graduation?

A. Yes, sir.

Q. Do you know Vernon W. Pancoast, the plaintiff in this case?

A. Yes, sir.

Q. Did you see him on October 12th, 1912?

A. Yes, sir.

Q. Did you give him any medical treatment on that day?

A. Yes, sir.

Q. State where he was when you gave him this treatment, and under what condition you treated him?

A. He was in a room in the Commercial Hotel, lying on a bed, with an injured head.

Q. What was the extent of the injury to his head?

A. He had a compound comminuted fracture of the skull.

Q. What do you mean by a compound comminuted fracture?

A. A compound comminuted fracture means where there is a communication from the external in through the bone, into the brain, and the bones are smashed up, in pieces.

Q. There is a communication from the external. Do you mean from the outside of the skull?

A. From the outside into the brain.

Q. Was the brain exposed through the injury?

A. The brain was oozing out through the wound.

Q. What treatment did you give him, or what medical treatment did you give him there at the hotel?

A. We shaved his head, cleaned the scalp, painted it with iodine, and put a sterile cloth on, before we examined it, and found he had a compound comminuted fracture, and sent him to the hospital.

175 Q. Did you see him at the hospital?

A. Where I operated on him.

Q. What did you operate on him for at the hospital?

A. For a compound fracture of the skull.

Q. What did you do?

A. Removed the bone that had been driven into the brain, and closed the wound.

Q. Was the brain injured by the bone driven into it?

A. Yes, sir; the bone was driven in for about an inch or an inch and a half.

Q. Was the brain substance or brain tissue impaired?

A. Yes, the brain tissue was lacerated.

Q. Was any of the brain tissue removed?

A. Only what flowed out when the bone was taken away; the loose brain tissue oozed out from the wound.

Q. Some oozed out from the wound?

A. Yes, sir.

Q. Do you know how much approximately oozed out?

A. I judge at least a tablespoonful.

Q. Did you treat him for any other bodily injuries at that time?

A. He had some other bruises and cuts on him, which apparently at that time didn't amount to very much, and I wouldn't be able to accurately describe them. I think he had a toe smashed, and bruised on one shoulder.

Q. Why do you say they wouldn't amount to much at that time?

176 A. The other was the serious part of the injury. A man with a compound fracture of the skull, we wouldn't pay much attention to a contusion.

Q. The brain injury was the serious one?

A. Yes, sir.

Q. How much bone did you remove from his skull?

A. Well, it was irregular in shape, elongated. I imagine it would be about an area of an inch and a half in diameter; it was circular.

Q. Has that bone ever been replaced?

A. I think not.

Q. What covers that hole in his skull?

A. Fibrous tissue. The true tissue will not grow. It would be what we call scar tissue.

Q. Is the scalp laid over it?

A. Yes, sir.

Q. How thick is that covering over the hole in his head?

A. The protection to the scalp?

Q. Yes?

A. It is fairly thick. I would judge between one-eighth of an inch and a quarter of an inch.

Q. Does his brain lie next to that, or not?

A. The membranes were sutured over before the scalp was closed. If they united, they are over there; if they didn't—I don't know whether they did or not. I hope they did.

Q. There are covers to the brain, are there not?

A. Yes.

Q. Envelopes which enclose it?

A. Yes, sir.

Q. Were they lacerated?

A. Yes.

Q. By this injury?

A. Yes, sir.

177 Q. Will that brain substance that oozed out be replaced by nature?

A. No, sir. There will be a scar in his brain, too.

Q. What condition is likely to follow this loss of brain substance or tissue?

A. It is liable to be followed by serious conditions, such as what we would call epilepsy or convulsions, fits, besides the paralysis.

Q. You made an examination of this man since your treatment at the hospital, have you not?

A. Yes, I judge a year or so ago.

Q. You were present here a year ago?

A. Yes, sir.

Q. You have seen him about here since you were here for this trial?

A. Yes, I saw him today.

Q. What is his condition likely to be with regard to improvement? What are his chances of improvement?

A. Well, I couldn't see any hope for him ever being any better than he is.

Q. Do you notice any improvement in him since last year?

A. No, sir.

Q. What is the character of the substance which will grow in the brain where the tissue oozed out?

A. Well, it would be connective tissue or scar tissue. It would have no brain function.

Q. Is that true tissue?

A. It is not true tissue, no, sir.

Q. Is true tissue ever replaced?

A. Not in the body, excepting it might be bone.

Q. Will that scar tissue connect the brain where the substance oozed out, and remain that size, the size of the connecting  
178 tissue, or will it likely grow?

A. Scar tissue doesn't grow. It contracts the older it gets.

Q. What is likely to follow, what bodily conditions, due to this growth or contraction of the scar tissue?

A. That is what I say is liable to develop—these convulsions, from irritation.

Q. Did you notice anything with respect to his right arm when you examined him?

A. Do you mean the last time?

Q. Yes?

A. His arm is still paralyzed, or partially paralyzed.

Q. Is that paralysis attributable to the injury to his brain?

A. Yes, sir. When I first saw him it wasn't there.

Q. That was simultaneous, or just practically at the same time the accident happened, that you first saw him?

A. I saw him right after the accident.

Q. The paralysis had not yet set in?

A. Not yet.

Q. How long after the injury was it that the paralysis set in?

A. Some time through the night after the injury. It was there the next morning.

Q. Was it the natural consequence of the injury at that time?

A. Yes.

Q. Following as it did, the next morning?

A. Yes, sir. The outer portion of the brain paralysis might be simultaneous with the injury, or it might develop within the next twenty-four hours.

179 Q. Did you notice anything peculiar about his speech?

A. Not after the accident.

Q. I mean at your examination of him?

A. He still hesitated some on his words. He is suffering from aphasia.

Q. Is that condition attributable to the brain injury?

A. Yes, sir.

Q. In your examination of Mr. Pancoast,—that is, since the injury and since your treatment—did he complain any about a head pain, a feeling of a band around his head?

A. Yes, sir; he did complain of that.



Q. Is that sensation or condition that he notes, attributable to the brain injury?

By Mr. Cole: Objected to as leading.

By the Court: Ask the Doctor what he would say was the cause of that condition, if it existed in Mr. Pancoast's head.

By Mr. Jones:

Q. What would you say was the cause of that condition, that Mr. Pancoast describes?

A. I would attribute it to nervous disturbance.

Q. What would be the occasion of nervous disturbance in a man that had suffered an injury such as Mr. Pancoast has suffered to the head?

A. The same as any other man. The brain would be the occasion of the nervous disturbance, of any person in any case.

180 Q. Would this brain injury be sufficient to cause such nervous disturbance?

A. It would be.

Q. Did you hear him testify this morning as to difficulty or some impairment to his salivary glands?

A. Yes.

Q. To what would that be attributable?

A. That would be attributable to the injury to his nerves, his facial paralysis.

Q. Did you hear him testify this morning that he now suffers from loss of memory?

A. Yes, sir.

Q. To what would that condition be attributable?

A. That would be attributable to the same cause, to the brain injury.

Cross-examination.

By Mr. Cole:

Q. Is this loss of memory and his inability to articulate, and the dryness of his mouth and the nervous condition of his mind as to this band being around his head, all attributable to the injury in one particular locality?

A. Well, some of those. Now, his condition of the band around his head, we couldn't attribute that to any; that is a symptom.

Q. That is purely imaginary?

A. No, but we have to take his word for it. We don't know whether he has that feeling around his head or not.

181 Q. Is that portion of the brain that controls his speech and controls the salivary glands of his mouth and the paralysis of his right hand, all the same part of the brain?

A. They are all very closely centered in the one place.

Q. They are not all the same?

A. No, sir.

Q. They are entirely different portions of the brain, that control different functions of the body?

A. Yes, sir. They overlap, however.

182 By Mr. Jones: I also offer the testimony of Dr. Charles B. Schildecker, a witness called in the former trial of this case.

Testimony of Dr. Charles B. Schildecker read to the Jury as follows:

*Testimony of Dr. Charles B. Schildecker.*

Dr. C. B. SCHILDECKER, a witness called on behalf of plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. Are you a practicing physician?

A. I am.

Q. Where do you practice?

A. In the city of Pittsburgh.

Q. How long have you been practicing medicine?

A. Fourteen years.

Q. Are you a graduate of any school of medicine?

A. I am a graduate of Columbia University in the city of New York.

Q. Do you occupy any official position as a doctor or medical man, in this county?

A. I am on the surgical staff of the West Penn Hospital of this city.

Q. Do you occupy any position with the county?

183 A. I occupy no official position, but I do a great deal of work for the coroner of this county. The work consists of holding autopsies in cases that have come to a violent death.

Q. To what particular branch, if any, study of medicine have you given your attention?

A. Surgery.

Q. Have you had any experience in brain surgery?

A. I have.

Q. Any special experience in the surgery of the skull?

A. You see a good deal of that in the surgical service of a large and active hospital. A large percentage of my work is on the brain and skull.

Q. Do you know Mr. Vernon W. Pancoast, the plaintiff in this suit?

A. I do.

Q. Have you made an examination of Mr. Pancoast.

A. I have.

Q. Will you just relate to the Court and jury what condition you found Mr. Pancoast in, with respect to his physical condition?

A. On the left side of his head, about where my finger is, I found a very well marked depression. By that I mean a hole in his skull. It was about three inches long, and an inch and a half wide, and irregular in outline. The scalp, of course, had grown over that and projected downward into the hole. Upon inspection of Mr. Pancoast, I was struck by the fact that the right side of his face was paralyzed, showing about as I have my fingers. He was unable to talk plainly. He slurred over his words, talked slowly and 184 could not articulate plainly. Upon further examination, it was seen that his right hand was in that shape (indicating), and when I asked him to pick something up he could only do it with the greatest of effort, and when he would get his hand on an object then he was unable to put his hand out, it would stay that way. His whole arm was in the same condition. If he would move it here, hold it there for a few seconds, he would have to take the other one to straighten it out. The right leg is also affected in the same manner, but not to so great an extent. When I asked him to put his tongue out, it was seen to come out to one side, indicating paralysis. He tells me that he is unable to distinguish tastes of different kinds of food.

By Mr. Cole: He can tell what that condition is better than you. Tell what you found.

By Mr. Jones:

Q. You can tell what that would indicate, those symptoms that he described to you.

A. That is merely corroborative of my final conclusion. Upon examination of the urine that had been recently passed by him, I found large amounts of blood and pus mixed in it. He complained of inability to hold his water more than half an hour at a time. He complained also of a pain in this region, running from that region down into the region of the bladder. I saw the water only once, but Mr. Pancoast and the nurse testifies that it was much worse at times, at certain intervals he passed large quantities of pure—

185 By Mr. Cole: I doubt whether this is competent.

By the Court: It is a grave question as to how much of the history of a case that is given to a physician should be thrown into the witness box, and in some cases evidence has got into the jury box through the history of the case that could not come from the mouth of the subject himself.

By Mr. Jones:

Q. Confining yourself just to what you have observed—

By the Court: It is just what he observed. I think the proper way is to ask him what he found from his own observation, and then what conclusion he came to after getting the history of the case from the plaintiff.

By Mr. Cole: What his condition is, and to what he attributes it.

By the Court: Yes, it can be worked out that way.

A. All of the things that I have described, the condition of the hand, the leg, and the face, the manner of speech, indicate paralysis, and as a result of my examination of the case it is my opinion that this paralysis all came from this injury on the left side of  
186 his head.

By Mr. Jones:

Q. Is that permanent?

A. That is permanent.

Q. You have testified to having made an examination of the urine, and what you found?

A. Yes, sir.

Q. To what would that bladder condition, as evidenced by the urine which you examined, be attributable, Doctor?

A. That bladder condition is caused by his inability to properly empty his bladder. The inability to properly empty his bladder is merely another symptom of the paralysis. When one is unable to properly empty the bladder, the urine which stays in there undergoes decomposition, and is poisonous; it sets up an inflammation in the bladder, and the whole body suffers as a result of absorption of this poisonous urine which he is unable to get rid of, and from this cystitis, as we know it by that term—cystitis means an inflammation of the bladder—from this cystitis the inflammation extends upward into the kidney and produces the pain which I have spoken of in the kidney.

Q. It occasions the pain in the kidney?

A. I might add that I examined Mr. Pancoast about a year ago, and within a week ago last Monday, and again last Friday.

Q. Has he improved any in the last year?

A. He has not; he has gotten worse.

Q. Does this bladder condition that you have described, bear any direct relation to the brain injury?

187 A. In my opinion it does, as I explained awhile ago.

Q. What is likely, from your experience and knowledge of the authorities, what is likely to be the condition of this brain injury? Will it cause any physical impairment other than that from which he now suffers? Is he likely to suffer any physical impairment other than that?

A. It is very likely to.

Q. What is it likely to produce?

A. It is likely to produce what we call traumatic epilepsy, meaning spasms. You will get fits, as the result of the inflammation and irritation about the site of that injury. In addition to that, the probabilities are that other secondary conditions will develop along the same lines as the bladder; for instance, it is probable he will be unable to control his bowels later on, that he will be unable to walk, that the saliva will dribble from his mouth.

Q. In your opinion, what is the chance of improvement to Mr. Pancoast?

A. In my opinion, he has no chance of improvement.

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By Mr. Jones: I also offer the testimony of Dr. Jacob E. K. Morris, given at the former trial.

The testimony of Dr. E. K. Morris was read to the Jury as follows:

*Testimony of Dr. Jacob E. K. Morris.*

Dr. J. E. K. MORRIS, a witness called on behalf of the plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

- Q. Where do — reside?  
A. Olean, New York.  
Q. Are you a practicing physician?  
A. Yes, sir.  
Q. How long have you been practicing medicine?  
A. Thirty-five years.  
Q. Are you a graduate of any medical school?  
A. University of Buffalo.  
Q. What has been your practice—the nature or character of it?  
A. For the last twenty years it has been mostly surgery.  
Q. Do you know Vernon W. Pancoast?  
A. Yes.  
189 Q. Have you treated him at any time?  
A. At times; yes, sir.  
Q. Have you treated Mr. Pancoast within the last year?  
A. Yes, sir.  
Q. When did you give Mr. Pancoast a treatment?  
A. He came to Olean, I think about the—perhaps the fore part of April or the middle of April. His mother was sick and he had been there a few days when he was taken with a chill and fever, and then he called my attention to the fact that he was having trouble with his urine.  
Q. What was the trouble that he was having with his urine?  
A. He was passing large quantities of blood and pus from his bladder, and I saw him three times a day for several days, he was so very sick and then saw him twice a day for several days. From the 30th day of April to the 21st day of May I treated him for this condition of the bladder.  
Q. Was he confined to his bed?  
A. Yes, sir, he was confined to his bed for the first two weeks of that time.  
Q. Have you made an examination of Mr. Pancoast, a thorough, careful examination?  
A. Well, such an examination as is necessary for treating him, yes, sir.  
Q. Do you know what injury to his head he has?  
A. Yes, sir. I have been intimate in the family, have treated

the family for a great many years, and saw Mr. Pancoast when he was home, when he came home from Dubois at the time of his injury, and frequently when he has been at his mother's I have seen him; and I knew of the injury and his symptoms.

190 Q. What have you noted with respect to his physical condition on the right side?

A. I have noticed his paralysis, his inability to use his arm, and the trouble with his speech, trouble with his leg, the difficulty he has in talking and the difficulty in using himself, and I have noticed a constant loss of weight; from time to time he has been getting thinner.

Q. Did you know the state of Mr. Pancoast's health prior to this accident?

A. Yes, sir; I have been acquainted with him for twenty-five years.

Q. What was the condition of his health?

A. With the exception of this one knee, which had given him some trouble, he had been a very healthy man.

Q. That was his left knee?

A. Yes, sir; his left knee.

Q. The paralysis which you have noted is in his right side and leg?

A. Yes, sir.

Q. To what is this bladder condition attributable?

A. To his paralysis, his inability to empty his bladder. I have washed out his bladder several times after he has urinated as best he could, and there is always several ounces of urine left in his bladder, which he is unable to void.

Q. What, in your opinion, is his chance of improvement?

A. I do not think there is any chance of improvement.

191 Cross-examination.

By Mr. Cole:

Q. Does pus in the urine come alone from paralysis of the bladder?

A. No, sir.

Q. Does blood in the urine come alone from that?

A. No, sir.

Q. It is not an unusual thing in a great many different conditions—either pus or blood?

A. It comes from other things, but we have examined him for other things.

Q. What does cause pus in the urine besides paralysis?

A. Any infection of the bladder.

Q. He has an infection of the bladder, has he, now?

A. Yes, sir; from the urine staying in.

Q. Did you examine him before he got this injury, to know what the condition of his bladder was?

A. No, sir.



Q. Did you ever examine him until this acute attack within the last six or eight weeks, for the condition of his bladder?

A. Yes, sir.

Q. When?

A. It is about six or eight months ago.

Q. Since this injury has become acute, had you ever examined him before that?

A. No, sir.

Q. You don't know anything about what the condition of it was?

A. No, sir.

192 Q. Because of your knowledge of this injury, you attribute the paralysis to the injury, do you? That is, if you didn't know of that injury, this paralysis might be attributable to other causes?

A. If there wasn't any injury, it would have to be.

Q. If you didn't know of the injury? Did you examine for other causes?

A. Yes.

Q. What did you examine for?

A. I made an examination as to the condition of his blood and his general condition.

Q. What was the condition of his blood?

A. His blood was good.

Q. Then this poison in his bladder hasn't affected his whole system yet?

A. That was some time ago that I made that examination.

Q. Some time ago that he had this paralysis,—it was since he had the paralysis?

A. Yes, sir.

Q. What other condition did you examine him for that would cause paralysis?

A. I spoke of his blood. That was the only other thing.

Q. There was no other?

A. No, sir.

Q. It is simply your opinion that you give in this case as to his bladder condition? There is nothing you can demonstrate it by?

A. Yes, sir; just my opinion.

Q. And it is your opinion that he won't get any better?

A. Yes, sir.

193 Q. If course, that can't be demonstrated, you have to wait and see?

A. Well, we have the history of other cases, so we know pretty well what is coming.

Q. Some of them get well that are worse than he?

A. No, sir.

Q. No one ever saw a man as bad off as Mr. Pancoast, that got well?

A. I don't think so.

Q. You have seen men that were not able to walk around, that afterwards became well and healthy?

A. Not from this condition.

Q. From various conditions you have seen them?



A. Yes, sir.

Q. You have seen them have pus in the urine and blood in the urine, that were prostrate in bed, and then afterwards get up and live a good many years a healthy life?

A. Yes, sir.

Q. That is not at all unusual?

A. Well, it is unusual, but it does happen sometimes.

Q. Doesn't it have a good effect on them to get rid of the litigation that is pending over an injury?

A. It certainly does.

Q. And a great many of them improve much more rapidly after the termination of the law suit, than they do before?

A. Anybody does.

Q. That is a natural condition?

A. Yes, sir.

Q. And that may be so without the man consciously knowing it?

A. Yes, sir.

194 Redirect examination.

By Mr. Jones:

Q. What has been the character of Mr. Pancoast's condition since the injury up to the present time, with respect to improvement?

By Mr. Cole: I understand the Doctor did not treat him until about eight months ago.

Q. You didn't treat him?

A. No.

By Mr. Jones:

Q. Since your knowledge of the case, what has been his condition?

A. He has been failing all the time.

Q. What, in your opinion, and from your knowledge of the authorities, is likely to follow such a brain injury, what physical condition?

A. Just paralysis and then they are very apt to get paralysis of their bladder, and then paralysis of their rectum, and then this spasmodic condition that he has in the hand, that may extend so that he may get spasms in any of his muscles, a general spasmodic condition.

195 By agreement of counsel, the testimony of the foregoing witnesses, whose testimony is offered by plaintiff, and read to the jury, is received.

*Testimony of Mrs. Clara N. Pancoast.*

Mrs. CLARA N. PANCOAST, having been duly sworn, testified as follows:

## Direct examination.

By Mr. Jones:

- Q. Where do you reside?  
A. Olean, New York.  
Q. You are the widow of Vernon W. Pancoast?  
A. Yes, sir.  
Q. The injured man that we speak of in this case?  
A. Yes, sir.  
Q. How long have you been married?  
A. Twenty-two years.  
Q. Mr. Pancoast died in August of 1915?  
A. Yes, sir.  
Q. How long have you lived in Olean?  
A. A little over two years.  
Q. Where did you live before that?  
A. In Alden.  
Q. When did you go to live at Olean? Not exactly the time, but with respect to Mr. Pancoast's life.  
196 A. Mr. Pancoast was taken sick at his mother's and I came down then.  
Q. Mr. Pancoast's mother lived in Olean?  
A. Yes, sir.  
Q. You came down there?  
A. Yes, sir.  
Q. At that time?  
A. Yes, sir.  
Q. Was that his last illness, or not?  
A. It was.  
Q. And when did that illness come upon him?  
A. Along about the last of April, I think.  
Q. Preceding the August of his death?  
A. Yes, sir.  
Q. Do you remember the accident befalling Mr. Pancoast in October of 1912?  
A. Yes, sir.  
Q. Where were you at the time?  
A. Alden, New York.  
Q. Your home was there, then?  
A. Yes.  
Q. That was the place of Mr. Pancoast's residence?  
A. Yes.  
Q. When did you first know of the accident that befell Mr. Pancoast in Dubois?

A. I think it was about six o'clock.

Q. Of that same day?

A. Yes. I think he was hurt about four or five, and we had the message about six.

Q. You received a message?

A. Yes, sir.

Q. What did you do then?

A. I got ready and came to Buffalo, and then on to Dubois.

197 Q. When did you arrive at Dubois?

A. About five o'clock in the morning, the next morning.

Q. Where did you find Mr. Pancoast when you got there?

A. At the hospital.

Q. How long was he in the hospital?

A. About three o'clock, I think.

Q. Did you remain with him there during that time?

A. Yes, sir.

Q. Then where did you go with him?

A. We went to the hotel.

Q. And how long did he remain in the hotel?

A. Two weeks.

Q. Were you there with him during the time he was at the hotel?

A. Yes, sir.

Q. Then where did you go with him?

A. We went to Olean, to his mother's.

Q. How long did he remain there?

A. I really don't know, but think about two or three weeks. I don't just remember.

Q. And then where was he taken?

A. To Alden, to our home.

Q. That in the fall of 1912?

A. Yes, sir.

Q. What was the condition of Mr. Pancoast that you found him in? Just describe to the Court and jury the condition you found Mr. Pancoast in the first time you saw him after the accident, the day succeeding the accident, and the general trend of his condition up until the time of his death?

198 A. As I said, I went direct to the hospital, and he hardly recognized us. Do you want the condition that he was in?

Q. Yes. What you noted of the change in his physical condition, from what it had been prior to the accident. What was his health prior to this injury; what was the condition of his health?

A. Very good.

Q. What were his habits? Was he a temperate man or not?

A. Yes, sir; he never drank or smoked.

Q. State to the Court and jury what change you noticed in his physical condition after the injury?

A. His side was paralyzed and he complained greatly of his head when he moved it, it hurt him so and you could see by his expression that he was in pain.

Q. Was he able to do any work after the injury?

A. No.

Q. Was he a working man prior to the injury?

A. Yes, sir; a man that attended to business every day.

Q. Did you note any change in his mental condition after the injury?

A. Yes, sir.

Q. What did you note?

A. His memory was not at all good.

Q. Will you just state any other change you might have noted in his mental condition, if any?

A. His disposition was entirely changed. He was always a man with—well, I might say things didn't seem to bother him; if they did, he would keep it to himself.

Q. What do you mean?

A. When he was well; but after the accident he was entirely different from that.

199 Q. In what way was he different?

A. Very irritable. When things didn't go just right he would be very irritable.

Q. To what extent did you notice that the paralysis you have spoken of, affected him physically?

A. His speech was impaired. The saliva glands could not do their work.

Q. Did you notice anything about his arm?

A. He had no use of that side at all.

Q. Did you ever observe him in trying to use his right side, what effort he would put forth, in order to make use of his right side?

A. He had very little use of it. He couldn't use it. He had to use his left hand most of the time, or all the time, after he was hurt. He couldn't write.

Q. How was his speech?

A. Very poor. His articulation was very poor. It was hard for him to get out words.

Q. What was his condition during the time of his last illness? Was he confined to bed all of that time?

A. Not all the time, but the greater part of the time.

Q. The greater part of the time?

A. Yes.

Q. That is, from April to August, 1915?

A. Yes.

Q. Were you put to any expense particularly during that time and since his injury, for medical services?

A. Yes, sir.

Q. Necessitated by his injury?

A. He had doctors, and then we had nurses for him all the time he was sick, during this last sickness.

200 Q. How much did that cost you, do you know?

A. You mean the doctors?

Q. No, the nurses during the last illness.

A. I would say about \$450.

Q. Do you have in mind, or do you recollect in what items of ex-

penses, doctors' bills or medicine during any of the time of his illness, including the last one?

A. I know what Dr. Morris' bill was.

Q. What was Dr. Morris' bill?

A. \$230.

Cross-examination.

By Mr. Miller:

Q. Wasn't Dr. Morris' bill only \$100 or \$125?

A. \$205, and then there were two X-rays; that would make it \$230.

Q. Was that for attendance upon Mr. Pancoast prior to his death?

A. Yes, sir.

Q. It was not for consultations for preparation of this case after it was made?

A. Oh, no.

Q. I notice by your former testimony that you testified that it was "\$100 or \$125." That is why I asked you the question. You say it was \$230?

A. Yes. I don't know why I said that before, because I know now. I have it right here.

Q. When you came to Dubois in October of 1912, how long did you remain there?

A. I should say about five weeks.

201 Q. When you left Dubois did Mr. Pancoast leave with you?

A. Yes, sir.

Q. Where did you go from Dubois?

A. To Olean.

Q. At that time was his condition improved?

A. He was able to leave the hospital and hotel, and was anxious to get home.

Q. He was able to travel from Dubois to Olean?

A. Yes, sir.

Q. How long did he remain at Olean?

A. About two weeks, I think.

Q. And from there where did you go?

A. To Alden, our home.

Q. How long did you remain at Alden at that time?

A. I couldn't remember. I don't remember.

Q. During all that time, apparently he was improving in physical condition, was he not?

A. Yes, he did seem better.

Q. And after remaining at your home in Alden, he then returned to Dubois?

A. Yes, sir.

Q. And he remained at Dubois from that time until the following April, did he not?

A. He was home during some of the time.

Q. Intermittently, to see the family, but he was engaged in business down there during that time?

A. Supposed to be.

Q. And during that time this new factory at Falls Creek was built, was it not?

A. Yes, sir.

Q. And he was there, if you know, looking after this business, this work of building the new factory?

202 By Mr. Jones: Objected to as not proper cross-examination.

By the Court: Inasmuch as there has been testimony as to his general condition, I think I could not exclude inquiry as to his condition, if she knows.

By Mr. Jones: It is further objected to as being hearsay.

By Mr. Miller:

Q. Do you know what he was doing down at Dubois?

A. He was doing very little. He wasn't able to do anything. He should have been home.

Q. Do you know that of your own knowledge?

A. I know what he told me.

Q. Do you know whether they were building this new plant down at Falls Creek at that time?

A. They were.

Q. And do you know whether he was down there interested in the building of this new plant?

A. He was.

Q. When did he finally go home to Alden?

A. I don't remember that.

Recess.

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#### Afternoon Session.

By Mr. Jones: Counsel for plaintiff offers in evidence Exhibit A, being the political banner suspended across Long avenue in October of 1912, which it is admitted is made of mesh with canvas, political portraits and advertisements fastened to the mesh, and which is 24 feet wide and 15 feet deep. It is further admitted that along avenue at the place where the banner was suspended was 60 feet wide from building line to building line.

Counsel for plaintiff also offers in evidence plaintiff's Exhibit No. 1, being the bill of the Dubois Electric Company.

Plaintiff rests in chief.

By Mr. Miller: May it please the Court, we believe this case now stands in just the same position that it did at the close of the other trial. The Circuit Court of Appeals has said in the opinion which was filed, that there could be no liability upon the defendant for this

204 accident, unless the defendant owed some duty on the day of the accident to Vernon W. Pancoast, and there was no duty owing by the defendant to Vernon W. Pancoast, unless there was a continuing obligation upon the defendant to support and maintain this banner at all times, and that there was no testimony showing that there was such a continuing liability on the part of the defendant. We say the testimony at this time fails to show any liability on the defendant to maintain this banner, and we move now for a compulsory non-suit, for the following reasons:

First. There is no sufficient testimony in the case to connect the defendant with the accident, so as to make it liable for the results therefrom.

Second. The testimony is not sufficient to sustain or support a verdict against the defendant.

Third. The only ground for holding the defendant liable in this case, would be a continuing duty resting on the defendant to so maintain the banner that persons on the street should not be in danger, and there was no testimony in the case to establish that continuing duty, or from which inference of such duty can be drawn by the jury.

Fourth. Plaintiff's testimony shows that the defendant company was merely employed to erect the banner and that it had no further relation to or connection with the banner, and that no duty rested upon the defendant company with reference to the banner or Vernon W. Pancoast on the day of the accident, and, therefore, there was no relation between Pancoast and defendant company, and no duty owed to Pancoast by the company on the said date that  
205 would justify a recovery in this case against the defendant.

By the Court: It is the purpose of the Court to follow the opinion of the Circuit Court of Appeals, so far as the opinion is applicable to the facts of this case, recognizing the correctness of the legal principles there laid down; but this is a motion for a compulsory non-suit, which is practically a demurrer to the evidence, in which every fact averred by the plaintiff and every fair inference from the facts averred and shown, must be assumed in favor of the plaintiff. Assuming that it is not sufficient to bind the defendant from the mere fact that they erected the banner, or the mere fact that they took it down, even though the erection was negligent, but that such facts must be shown as establish a duty upon the defendant company to in some way maintain or control the banner during the interim between the erection and the taking down, the testimony of Mr. Skinner being in substance: "I told them to put the banner up for me and when the election was over, to take it down, telling them I wanted nothing to do with it; I wanted them to attend to it; I didn't want to go on the roof," I am not prepared at this stage of the case to say as a matter of law that thereby no right of control was imposed upon the defendant company. The question can be presented again at the conclusion of the testimony, and the Court



will then pass upon the question when all the facts have been heard. The motion for compulsory non-suit is, therefore, overruled.

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## DEFENDANT'S CASE.

*Testimony of Irvin Blakesley.*

IRVIN BLAKESLEY, a witness called on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Where do you live?

A. Dubois.

Q. What is your business?

A. Electrical contracting business.

Q. Have you any business relations with the Dubois Electric Company at this time?

A. No, sir.

Q. Did you have in October, 1912?

A. Yes, sir.

Q. What relation did you bear to the company at that time?

A. I was assistant superintendent.

Q. When did you sever your connections with the company?

A. In December, 1916.

Q. Did you have any conversation with Morris O. Skinner, in reference to the suspension of this banner in question?

A. Yes, sir.

207 By Mr. Jones: As to when?

By Mr. Miller.

Q. When was that with reference to the suspension of the banner?

A. I think that was the morning of the first day that the banner was suspended.

Q. Where did you have that conversation?

A. It was in front of our office, on the street.

Q. Where was your office located?

A. In the Deposit National Bank building.

Q. Was that one of the buildings to which this banner was subsequently fastened?

A. Yes, sir.

Q. You say you met him on the street in front of your building?

A. Yes.

Q. What conversation did you have with him?

A. I was just going out of the office, starting for the power house, and Mr. Skinner met me on the street and stopped me. He said: "We have a Taft banner we want you to string across here, and

take down after the election." I said, "We will have nothing to do with it."

Q. What did you do then?

A. I went on and left him to catch a car, and went to the power house.

Q. Did you know at that time where Mr. Skinner went?

A. No, sir.

Q. Did you have any further talk with him that day, about the suspension of this banner?

A. No, sir.

208 Q. Did you have any further talk with him prior to your seeing the banner suspended across the street?

A. No, sir.

Q. Did you have any conversation with him that day in your office in the presence of your brother, Coulson Blakesley?

A. No, sir.

Q. Did you see the banner suspended across the street between the Commercial Hotel and the bank building?

A. Yes, sir.

Q. Do you know whether the banner came loose on the hotel side?

A. Yes, sir.

Q. Did anybody see you about putting the banner up again?

A. No, sir; not about putting it up.

Q. Did you have any other conversation with reference to the suspension of this banner, than the one you had with Mr. Skinner on the street?

A. Did I have any conversation with Mr. Skinner?

Q. Yes.

A. No, sir.

Q. Did you have any conversation with anybody else interested in putting up this banner?

A. No, sir.

Q. Were you present when Mr. Skinner talked with your brother, Coulson, about putting up this banner?

A. No, sir.

Q. Were you present in the office when the two employees went with Mr. Skinner to suspend this banner?

A. No, sir.

209 Cross-examination.

By Mr. Jones:

Q. Do I understand you, Mr. Blakeslev, that all you know about this was a conversation you had with Mr. Skinner outside of the office of the Electric Company, the day that the banner was erected?

A. Yes, sir.

Q. You weren't inside of the office at any time when Mr. Skinner was there?

A. No, sir.

Q. And you went on to catch a car?

A. Yes, sir.

Q. And was Coulson Blakesley present when you talked to Mr. Skinner?

A. No, sir.

Q. On the outside of the office?

A. No, sir.

Q. And then did Coulson Blakesley hear you say to Mr. Skinner, "We'll not have anything to do with it?"

A. You will have to ask him.

Q. Was Mr. Coulson Blakesley present?

A. No, sir.

Q. Was he within hearing distance?

A. I couldn't see him.

Q. Did you see him about?

A. No, sir.

Q. How far from the office were you standing when you were talking to Mr. Skinner?

A. I suppose about fifty feet?

Q. You were talking in ordinary tones?

A. Yes, sir.

210 Q. You were not angry about his asking you to erect a Taft banner?

A. No, sir.

Q. And after you went to take a car, you didn't return again while Mr. Skinner was there?

A. No, sir.

Q. And had no further conversation with Mr. Skinner about it?

A. No, sir.

Q. So the statement you say you made, "We'll have nothing to do with it," was made outside of the office?

A. Yes, sir.

Q. Fifty feet away from it?

A. Yes.

Q. Not in the presence of any one else of the Electric Company?

A. No, sir.

Q. Did you communicate that to any one else of the Electric Company before they put up the banner?

A. No, sir.

Q. I believe you said that no one had said anything to you about erecting the banner after Mr. Skinner had first spoken to you?

A. No, sir.

Q. As I understand it, that was the whole of your conversation?

A. Yes, sir.

Q. What office did you say you occupied?

A. Assistant superintendent.

Q. You severed your connection December of last year?

A. Yes, sir.

Q. Did you have an interest in the company?

A. No, sir.

- Q. What was the occasion for severing your connection?
- 211 A. I went into business for myself, my brother and I.
- Q. Your father had been connected with the Electric Company?
- A. Yes, sir.
- Q. Did he sever his connection?
- A. Yes, sir.
- Q. At the same time?
- A. He severed his connection before that.
- Q. About the same time, or how long before?
- A. A month.
- Q. He had an interest in the company, had he not?
- A. Yes, sir.
- Q. Did he dispose of his interest at that time?
- A. Yes, sir.
- Q. Who is C. E. Blakesley?
- A. My brother.
- Q. Coulson?
- A. Yes, sir; Coulson.
- Q. Who is R. B. Blakesley.
- A. Robert Blakesley.
- Q. Is that this Mr. Blakesley?
- A. Yes, sir.
- Q. Coulson Blakesley had charge of things, did he not?
- A. Yes, sir.
- Q. When orders were received for work to be done by the Electric Company, they would be received by Coulson Blakesley?
- A. Yes, sir.

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*Testimony of Coulson E. Blakesley.*

COULSON E. BLAKESLEY, a witness called on behalf of defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

- Q. Where do you live?
- A. Dubois.
- Q. What is your business?
- A. Electrical contractor.
- Q. Have you any business relations with the Dubois Electrical Company at this time?
- A. None whatever.
- Q. Are you financially interested in the company?
- A. No, sir.
- Q. When did you sever your relations with the company?
- A. December 1st, 1916.
- Q. At the same time your brother did?
- A. Yes, sir.
- Q. Were you connected with the company in October of 1912?
- A. Yes, sir.

Q. In what way?

A. Chief clerk.

Q. Where were your duties performed?

A. In the office of the Dubois Electric Company.

213 Q. Where was the office located?

A. Deposit National Bank building.

Q. On what street is that?

A. Long avenue.

Q. Is that the same building to which one end of this banner was fastened?

A. Yes, sir.

Q. Did anybody come to the office to see about the suspension of this banner?

A. Yes, sir.

Q. Who was that?

A. M. O. Skinner.

Q. Do you remember about what time of day it was?

Q. I rather think shortly after noon.

Q. What was your conversation?

A. Mr. Skinner wanted us to suspend a political banner. I told him we were not in a position to do—, we hadn't the men; they were all out on another job, and while we were talking Mr. Terry Johnston and one of our other employees came in and Mr. Skinner remarked, these men could do it. He would take them and show them how and where to put it up, and I directed the men to go with Mr. Skinner.

Q. You spoke of Mr. Terry Johnston. Is that Terrence W. Johnston?

A. Yes, sir.

Q. Do you know who the other employee was?

A. I think Mr. Doud.

Q. What is his first name?

A. I don't know. They call him Peggy.

Q. Isn't it Edgar?

A. Yes.

214 Q. Is that the only conversation, so far as you can remember, that you had with Mr. Skinner?

A. At that time?

Q. Yes?

A. Yes, sir.

Q. Was your brother, Irvin, in the office at that time?

A. No, sir.

Q. Was he there at any time during that day while Mr. Skinner was there?

A. No, sir.

Q. Were you present at any conversation which Mr. Skinner had with your brother, Irvin, in the office that day, about suspending this banner?

A. No, sir.

Q. Were you there all afternoon?

A. Yes.

Q. Were you there all of the forenoon?

A. Yes, sir.

Q. State whether or not Mr. Skinner said anything to you the day about taking down this banner after the election.

A. Absolutely nothing.

Q. These two men, you say, went with Mr. Skinner?

A. Yes, sir.

Q. Did they make any report to you upon their return to office as to what they had done?

A. No, sir.

Q. Did they subsequently turn in any time slips to you?

A. Yes, sir.

Q. Did they turn in any time slips covering the work of suspending this banner?

A. Yes, sir.

215 Q. What was the time turned in?

Objected to by Mr. Jones as being irrelevant and immaterial, and further, as not the best evidence.

By the Court: In a general way, I think he can give it.

Question read, as follows:

Q. What was the time turned in?

By Mr. Miller:

Q. If you know?

A. It was a certain number of hours for suspending the Ta banner—I don't know how much.

Q. Was there any other conversation between you and Mr. Skinner?

A. No, sir.

Q. Was there any other contract or arrangement made between you and Mr. Skinner with reference to suspending this banner except the one you have now detailed?

By Mr. Jones: Objected to, as a legal conclusion of the witness to the contract.

By the Court: Objection overruled, and exception noted.

A. No, sir.

216 By Mr. Miller:

Q. Do you know whether this banner came loose on the hotel side after it was first erected?

A. Yes, sir.

Q. Do you know whether it was again put up on the hotel side?

A. Yes, sir.

Q. Did anybody come to you to have this done?

A. Yes, sir.

Q. Who was that?

A. M. O. Skinner.

Q. Where were you at the time?

A. In the office.

Q. Do you remember what day that was?

A. I do not.

Q. Was or was it not the same day that it was put up the second time?

A. Yes, sir.

Q. What did Mr. Skinner say to you that day?

A. He came in and told me the banner came off and wanted to know if I would put it up. And I made the work order for the men to put the banner up.

Q. What was this work order to which you refer?

A. It was a form we have for giving instructions to the men to do certain work.

Q. You stated you made out a work order for your workmen to go and put up this banner?

A. Yes, sir.

Q. The first day that it was put up did you send any foreman with your men to take charge of the work?

A. No, sir.

Q. On the second day that it was put up, did you give any directions to any foreman or send any foreman along?

217 A. No, sir.

Q. Do you know who received that work order from the office?

A. No, sir; I do not.

Q. Do you know that it was received by one of your employees?

A. Yes.

Q. Do you recollect about what time in the day Mr. Skinner came to the office?

A. I do not.

Q. Was any report made to you at the office during that day with reference to putting up this banner?

A. I don't know as I get the question.

Q. Was any report made to you at the office by any of your employees this second day with reference to their efforts made in putting up this banner?

A. No, sir.

Q. Was Mr. Skinner back at the office the second time that day?

A. Not to my knowledge.

Q. You had only one interview with him that day?

A. Yes, sir.

Q. At that time, did Mr. Skinner say whether or not he had seen somebody else connected with the company?

A. No, sir.

Q. Do you know whether he had seen somebody else that day?

A. I do not.

Q. Was the banner put up by your company that day?

A. Yes, sir.

218 Q. Were there time slips turned in for this work?

A. Yes, sir.



Q. By the day, contract or hour?

A. By the hour.

Q. Were you paid for that work?

A. Yes, sir.

Q. Who paid you?

A. M. O. Skinner.

Q. Was there any other arrangement, understanding or, contract between you and Mr. Skinner or your company and Mr. Skinner that you know of?

A. No, sir.

Q. On that day, with reference to this banner, except what you have stated?

By Mr. Jones: Objected to, as calling for a legal conclusion by the witness.

By the Court: I think he has a right to state whether there was any other arrangement or agreement made by him than that which he has detailed. The objection is overruled, and an exception noted to plaintiff.

A. No, sir.

Cross-examination.

By Mr. Jones:

Q. You say you severed your connection with this electric company December 1st, 1916?

A. Yes, sir.

219 Q. Was that about the time your father severed his connection?

A. It was some time after father did.

Q. Your father had been one of the owners of the company?

A. One of the stockholders.

Q. And he sold out his interest and severed his connection with the company last fall?

A. Yes, sir.

Q. And thereafter you severed your connection?

A. Yes, sir.

Q. You testified you were chief bookkeeper?

A. Chief clerk.

Q. And you had charge of the office, did you not?

A. Yes, sir.

Q. Mr. Skinner came to your office and asked you to suspend a banner, take it down and attend to it, as he didn't want anything to do with it, did he not?

A. No, sir.

Q. You deny that?

A. I deny it.

Q. What did Mr. Skinner say?

A. He asked us to put up a banner, and I told him we couldn't do it, we didn't have any men, the men were all out on another job.

and, while we were talking, Mr. Terry Johnston and one other employee came in, and Mr. Skinner made the remark, "These men can put it up. I will show them where and how to put it up," and I directed the men to go with Mr. Skinner.

Q. You directed the men to go with Mr. Skinner?

A. Yes, sir.

220 Q. And those men were Torrence Johnston and Douth?

A. Yes, sir.

(Mr. T. W. Johnston was asked to rise.)

Q. Is that the man?

A. Yes.

Q. Is Mr. Douth here at present?

A. No, sir.

Q. So that Mr. Terrence Johnston is the only one of those two that you sent with Mr. Skinner that is present in court now?

A. Yes, sir.

Q. When did Skinner come into your office?

A. I don't know; I don't remember the date.

Q. I don't mean the date, but what time of day?

A. I think it was before noon. I don't remember the time of day.

Q. Didn't you say in direct examination it was shortly after noon?

A. That was the second time.

Q. That was the second time?

A. Yes.

Q. When was he there the second time, how long after the first time?

A. I don't know.

Q. Was it a day?

A. It was at least a day, it wasn't the same day.

Q. Didn't I understand you to say, on direct examination, that the Skinner had been put up the second time on the same day?

A. No, sir.

Q. It was a subsequent day?

A. Yes, sir.

221 Q. Was it the next day?

A. I don't know.

Q. Don't you know when you made the work order?

A. No, sir.

Q. You don't know how long afterwards?

A. No, sir.

Q. Who received that work order?

A. I don't know.

Q. Where did you put it?

A. Left it in the book.

Q. You left it in the book?

A. They came around for the orders, and they tore this work order off.

Q. Didn't you make out a work order for the work when it was first to be done?

A. Yes, sir.

Q. When you sent the men with Skinner?

A. I made a work order. I may have made it after they went with Skinner.

Q. You made a work order and sent them along with Skinner?

A. Made a work order after they went with Skinner. They went right away with Skinner.

Q. They didn't receive the work order before they left?

A. No, sir; not on the first job.

Q. You made that out after they left?

A. Yes, sir.

Q. How long after they left?

A. I don't know.

Q. You don't know?

A. No, sir.

Q. Was it the same day?

A. Yes, sir.

222 Q. You are sure it was after they left?

A. Yes, sir.

Q. Neither Torrence Johnston nor Doult were there at that time?

A. No, sir.

Q. They had gone with Skinner?

A. Yes, sir.

Q. How long had Irvin been gone from the office?

A. I don't know.

Q. Had you seen him lately?

A. I hadn't seen him.

Q. How long had you been in the office before Skinner came in?

A. I don't know, I don't remember; I can't recollect the exact hour Skinner came in.

Q. You remember well that he came in at this particular time?

A. Yes, sir.

Q. Don't you remember how long you had been in the office before he came there?

A. I do not.

Q. Couldn't you say whether it was half an hour or an hour?

A. I could not.

Q. Might you have just gotten in the office as he came there?

A. Possibly.

Q. Didn't you see Irvin outside?

A. I did not.

Q. Didn't you see him in the office?

A. I did not.

Q. Hadn't Irvin just left?

A. I don't know.

223 Q. I understood you to say on direct examination that you had had one conversation with Mr. Skinner, which was the first time, and then later I understood you to say that Mr. Skinner came back and ordered the banner replaced after it first came down.

A. I had a conversation the first day the banner was put up and

the first time it came down he came in again and I had a conversation with him.

Q. Did he tell you the banner was down?

A. Yes, sir.

Q. Did he tell you to put it up?

A. Yes, sir.

Q. What did you do?

A. Made the work order for the men to put it up.

Q. Did Mr. Skinner say anything to you at that time about attending to it?

A. No, sir.

Q. Who got the work order?

A. I don't know.

Q. And you deny that Mr. Skinner ever said anything to you about attending to the banner?

A. He never said anything to me about attending to it.

Q. Didn't he tell you to take it down, at the same time?

A. No, sir.

Q. Who did take it down?

A. Some of our men.

Q. And who told your men to take it down?

A. What do you have reference to?

Q. After the accident.

O. It was taken down twice after the accident.

Q. Who told your men to take it down? Did they get a work order?

224 A. To take it down from the hotel?

Q. Yes?

A. There was a work order for it.

Q. Who would make that out?

A. I don't know.

Q. Wouldn't you make it out?

A. Not necessarily.

Q. Who made out the work orders besides yourself?

A. There were two other employees in the office.

Q. And they all made out work orders?

A. Yes.

Q. Who were they?

A. Blain Moore and J. H. Crissman.

Q. Some of your men took the banner down, after the accident, from the hotel?

A. That was several days after.

Q. Some of them took it down?

A. Yes, sir.

Q. Who told you to take it down?

A. No one told me. That order was given to, I think, my father or Robert Blakeslee.

Q. No one told you?

A. Yes, sir.

Q. Who told you?

A. M. O. Skinner.

Q. You are sure of that now?

A. Yes, sir.

Q. Didn't you just testify a few minutes ago that your last conversation with Skinner was when he told you to put it up the second time?

A. I believe not.

Q. Haven't you just testified to that?

A. I testified the last conversation I had with him that day.

225 Q. Did you not testify that you had a conversation with him the day that he came and said he had the banner; then you later said you had another conversation with him at the time when he came back and told you to put it up, and that that was all of your conversations?

A. No, sir. That was the only conversation I had that day.

Q. Did you not so testify on direct examination?

A. No, sir.

Q. Did you not testify, in answer to Mr. Miller's question, that all of the arrangements you had with Skinner were in those two conversations?

By Mr. Miller: With reference to suspending this banner.

A. That was the only conversation I had in reference to suspending the banner.

By Mr. Jones:

Q. Didn't you say that was the only conversation you had with him?

A. I intended to say "suspending the banner that day."

Q. Now, you say that M. O. Skinner gave you the order to take it down?

A. Yes, sir.

Q. And why didn't you make out the work order, if you got the order to take it down?

Q. Why was it you said your father got the order?

226 A. I had something else in mind. I had another thing in mind, the day the banner came down, the day of the accident.

Q. And isn't it a fact that you didn't recall at all that M. O. Skinner came and told you to take that banner down?

A. I didn't recall at the time you asked me the question.

Q. But do you recall it now?

A. Yes, sir.

Q. How is it you recall now, a few minutes after the question was first asked, when it happened four or five years ago? How is it you happened to recall upon a few minutes' reflection that it was M. O. Skinner, when it happened four or five years ago?

A. I think it is natural in thinking over it.

Q. Why did you think it was your father?

A. Because I remember Mr. Skinner and Mr. Hess came to father after the accident, and asked him to put the banner up, and I was confused in that.

A. Are you confused now when you say Mr. Skinner came and told you to take it down?

A. I am not.

Q. Isn't it a fact that Skinner never came and told you to take the banner down?

A. It is not.

Q. And you are certain now?

A. Absolutely certain.

Q. Absolutely certain?

A. Yes, sir.

Q. How certain?

A. Absolutely.

Q. Whereas, you were confused before?

A. Yes, sir.

227 Q. You are absolutely certain now?

A. Yes, sir.

Q. And you were mistaken that the order was received by your father?

A. The order to take it down, yes, sir.

Q. You meant something other than that you had only two conversations with him?

By Mr. Miller: I submit, that is improper and I object to it.

A. When I stated that it was the only conversation I had with Mr. Skinner it was the only conversation I had that day.

By Mr. Jones:

Q. What day are you talking about?

A. The day the banner was suspended the second time.

Q. When was that day?

A. It was some time following the time it was suspended the first day.

Q. When was it suspended the first day?

A. I don't know the date.

Q. Then how do you know it was that day?

A. Because I know it was the day Mr. Skinner left the order with me.

Q. The first time?

A. The first time and the second time.

Q. And he came back to the office the second time?

A. What do you mean?

Q. Just what I said.

228 A. Do you mean when he came back after the banner came down the first time?

Q. When he came back the second time?

A. He came back—I only saw him once on the day the banner came down, the first time.

Q. When did you see him after that?

A. The next conversation I had with him, as far as I recollect, was when he ordered the banner taken down from the hotel.

Q. Where did he order it taken down to?

A. Taken down and suspended between two poles at the corner of Long and Brady.

Q. When did you have your next conversation with him after that—how long after that?

A. I think it was the day that the banner was taken down on election day.

Q. Where was it taken to then?

A. Taken to the Y. M. C. A.

Q. What time of the day was that?

A. I don't remember.

Q. Where did you see him?

A. In the office.

Q. He came to the office?

A. Yes, sir.

Q. On election day?

A. Yes, on Election day, as I remember.

Q. How long had it been that he was in the office before election day?

A. I don't remember.

Q. But you are sure that was the next time he was there, election day?

A. I think it was.

Q. Then when did you see him after that?

A. I don't know. I saw him on the street right along.

229 Q. You didn't see him with reference to the banner after that?

A. Yes.

Q. When?

A. It was, I think, several weeks after the banner was taken down?

Q. Where?

Q. In the office.

Q. What was that for?

A. He asked where the banner was, and I told him it was in the Y. M. C. A., where he directed us to take it, and then he asked where the iron cleat was, that that belonged to him. I told him that was with the banner, so far as I knew. The boys had been directed to take the banner down and take it to the Y. M. C. A.

Q. Do I understand you now that Mr. Skinner told you to take the banner, after it was taken down, to the Y. M. C. A.?

A. Yes.

Q. And that then he came to your office and asked where the banner was?

A. That was some time after it was taken down.

Q. He came and asked where it was after he had told you when to take it.

A. Yes.

Q. And you then told him where it was, and that happened to be the place where he had told you to take it?

A. Yes, sir.

Q. And he also asked about the cleat?



A. Yes, sir.

Q. And he came to inquire of you what you had done with the material, that banner, after it had been taken down by your employees?

230 A. He wanted to know what had been done with the banner. That was two weeks after it was taken down, or some time after it was taken down.

Q. Wasn't it the custom for H. B. Johnston, your foreman, to get the orders out of the order book?

A. No, sir; not necessarily.

Q. Didn't H. B. Johnston get the orders out of the order book for this work?

A. Not necessarily.

Q. Who got the first order out?

A. I don't know.

Q. When was it taken out?

A. I don't know.

Q. Wasn't it the custom for Johnston, the foreman, to take those orders out generally?

A. Not necessarily. On the smaller jobs, where the boys could go ahead and do it without instructions of the foreman, they went ahead and took them themselves.

Q. What was your work composed of mostly?

A. Mostly of taking care of the office work.

Q. I mean, what was the work of the Electric Company composed of mostly, smaller jobs or larger jobs?

A. I would say smaller jobs.

Q. Then you would say it wasn't your custom for H. B. Johnston to take the orders out of there?

A. The men would take them off, that came to do the work.

Q. I am asking if it wasn't your custom for H. B. Johnston to take the orders out of there?

By Mr. Miller: I don't think that is either relevant or material.

231 By the Court: Objection overruled.

Exception noted to defendant.

A. Not necessarily.

By Mr. Jones:

Q. What do you mean by "not necessarily"?

A. Mr. H. B. Johnston might take them out, or any of the other employees might take them out?

Q. Didn't Mr. Johnston take them out generally?

By Mr. Miller: Objected to, as immaterial.

A. Not necessarily.

Q. I am asking you if it wasn't the custom for Mr. Johnston to take them out more often than anyone else?

By Mr. Miller: Objected to, as immaterial.

By the Court: Ask what was generally done with reference to this matter. I do not think it is very material.

A. Any of the employees might take these orders out of the work order book and take them up to Mr. Johnston's desk.

232 By Mr. Jones:

Q. And Mr. Johnston would receive them first of all—that is, I mean, before the men would go out for work?

A. If they took them up, Mr. Johnston might see them first.

Q. Why would they be taken to his desk?

A. Because they all turned in their time at his desk.

Q. To Mr. Johnston?

A. No, sir. They charged the material on the work order.

Q. To whose desk did they turn these in?

A. Mr. Johnston's desk, the only desk in the stockroom.

Q. And if Mr. Johnston didn't take these work orders out of the book himself, who ever took them would take them to Mr. Johnston's desk?

A. Yes, sir.

Q. Where is the Dubois Electric Company's office?

A. In the Deposit Bank Building.

Q. That is one of the buildings to which the banner was fastened?

A. Yes, sir.

Q. On what floor of that building was the office?

A. The ground floor.

Q. Which side of the building was it on?

A. The Long avenue side.

Q. How far back from the corner of Brady street was the office?

A. I presume in the neighborhood of a hundred feet.

233 Q. From the time that Mr. Skinner first came into your office there that you have told us about, the first time he came in there, were you continuously at work during those days that immediately followed, or were you away?

A. I was at work.

Q. Daily?

A. Yes, sir.

Q. How long would you spend in your office daily?

A. Usually from 8:30 or 9:00 up to 5:00 in the evening and one hour off for lunch.

Q. And that was the length of time you were there, presumably, the day Mr. Skinner first came?

A. Yes, sir.

Q. And likewise on the subsequent days?

A. Yes, sir.

Q. This banner, as I understand it, then erected across Long Avenue attached to the Deposit National Bank Building, in which your office was, was flying across the street immediately outside of your office, was it not?

A. I think not, I think it was up towards the corner a little bit further.

Q. How far?

A. I don't remember.

Q. Your office, you say was about a hundred feet back?

A. From the corner.

Q. And the banner was between your office and the end of your building, at least, wasn't it?

A. I think it was.

234 Q. So that it couldn't have been more than a hundred feet away, could it?

A. No, sir.

Q. You could see the banner from your office, couldn't you?

A. Inside the office?

Q. No, as you entered the office.

A. Yes, sir.

Q. Just as you walked along the street and entered your office, the banner was right handy there overhead?

A. Yes, sir.

Q. And you did see it daily as you came along there to your office?

A. Yes, sir.

Q. And if the banner was down in the street, you were likely to see it as you entered your office?

A. Yes, sir.

Q. What time of day was it that Mr. Skinner came to your office after it had come down the first time, and told you to put it back, as you say?

A. I don't know.

Q. Do you have an idea?

A. I think it was in — morning, I am not positive.

Q. Were you at the office at that time?

A. Yes, sir.

Q. You were there when he came there?

A. Yes, sir. I was in the office when Mr. Skinner talked to me.

Q. He came there?

A. Yes.

Q. And when he came there and talked to you, the banner had not yet been put back?

A. No, sir.

235 Q. So that you arrived at your office before the banner had been put back?

A. Yes, sir.

Q. Did you not notice the banner down when you came to your office?

A. I don't remember that I did. In fact, I don't think the banner was clear down.

Q. I would like you to tell me exactly what you say Mr. Skinner said to you when he came to the office the first time?

A. He asked us to put up a Taft banner; I told him I wasn't in a position to do it, we hadn't the men; the men were all out on other

jobs. While we were talking, two of our employees came in, and he made the remark, "Here is a couple of men; they can do it," he said, "I will show them where and how to put it up," and I directed the men to go with him.

Q. What more did Skinner say?

A. Nothing more.

Q. Nothing more?

A. Not to my knowledge.

Q. Was all that Skinner said, "I have a Taft banner, and I want you to put it up," before you said you weren't in a position to do it? What was all he said before you made your first reply to him?

A. All I said, he said was that he asked us to put up a Taft banner.

Q. Is that what you undertook to do?

A. Yes.

Q. When you sent your men out?

A. Yes.

Q. You undertook for your company to put up that banner?

A. I directed the men to go with Mr. Skinner and put up the banner. I gave the men absolutely no directions other than  
236 to go with Mr. Skinner.

Q. And put up the banner?

A. And put up the banner.

Q. And when they went back after the banner had come down the first time, you undertook to put it up for them that time also, did you not?

A. Mr. Skinner came in and asked us to put it up, yes.

Q. And you made a work order for it?

A. Yes, sir.

Q. And you undertook to do that, did you not?

A. I didn't undertake to do it.

Q. I mean for your company.

A. I made the work order.

Q. And you directed the employees of your company to go and do it?

A. Not to my knowledge, any more than I made the work order instructing them to put up the banner.

Q. And you were in charge of your company's office, and you received the order, did you not?

A. No, I didn't receive it.

Q. Orders for work done, did you receive them?

A. No.

Q. Who did?

A. Well, as I told you before, they were taken from the work order book.

Q. That isn't what I mean. I mean when somebody came to your office to get work done, you were the one who would receive the orders from that party?

A. Not necessarily. Mr. Crissman or Mr. Moore or myself might have gotten the order.

Q. You say you did receive Mr. Skinner's order?

A. Yes, sir.

Q. And you did make a work order for it? This is the second time.

A. Yes, sir.

237 Q. And your men did go and put up the banner for Mr. Skinner?

A. Yes, sir.

Q. When as you say, Skinner came to you and told you to put the banner up the second time, and you made your work order, and your men went and put it up, did Skinner tell you where and how to put it up that time?

A. No, sir.

Redirect examination.

By Mr. Miller:

Q. Who owned this building in which you had your office at that time?

A. The Deposit National Bank.

Q. What is there located at the corner of Brady and Long avenue in this building?

A. The banking house.

Q. Your office is on the east, on Long avenue?

A. Yes, sir.

Q. Which floor did you occupy?

A. The ground floor.

Q. Were you a tenant of the Deposit National Bank?

A. Yes, sir.

Q. State whether or not your office was confined to the ground floor, or did you have any rooms up above that?

A. No, sir.

Q. How many rooms did you have on the ground floor?

238 A. Four rooms at that time that I remember.

Q. Was there one long room running through the building, divided by a partition?

A. Yes, sir.

Q. Do you know where Edgar Doult is?

A. I do not.

Q. Is he about Dubois?

A. I don't know, I haven't seen him.

Q. Do you know where he went from Dubois?

A. No, I do not.

Q. You haven't seen him about there for some time?

A. No, I haven't.

Adjourned.

239

Morning Session.

Wednesday, June 6, 1917.

*Testimony of Terrence W. Johnston.*

TERRENCE W. JOHNSTON, a witness called on behalf of defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Where do you live?

A. Dubois, Pennsylvania.

Q. Where were you living in October of 1912?

A. Du Bois.

Q. Whom were you working for at that time?

A. Dubois Electric Company.

Q. Did you have anything to do with erecting this banner the first time?

A. Yes, sir.

Q. Where were you when you first heard about the erection of the banner, that you were to erect it?

A. In the office.

Q. Who was there?

A. I don't remember now.

Q. Was Mr. Skinner there?

A. Yes, sir.

Q. Was Mr. Coulson Blakesley there?

240 By Mr. Jones: Objected to, as the question is leading.

By the Court: He might call his attention to the fact whether a certain party was there or not. Exception noted to plaintiff.

A. I don't remember.

By Mr. Miller:

Q. Did you hear any conversation there in the office, with reference to hanging this banner?

A. No, sir.

Q. What did you do towards the erection of the banner?

A. I did as Mr. Skinner told me.

Q. Did you leave the office to go to erect the banner?

A. Yes, sir.

Q. Who went with you.

A. Mr. Skinner.

Q. Who else went with you?

A. A fellow named Edgar Doud.

Q. Do you know where Edgar Doud is now?

A. I heard he was in Butler.

Q. How long has it been since he was about Dubois?

A. I couldn't say exactly how long.

Q. Did the three of you leave the office together, Mr. Skinner, Mr. Doud and you?

A. Yes, sir.

241 Q. Had you received any instructions from anybody as to what you were to do, before you left the office?

A. There was an order to hang a banner.

Q. Where did you go from the office?

A. Over to the Acorn rooms.

Q. Who took you to the Acorn rooms?

A. Mr. Skinner.

Q. Who was with you when you went there?

A. Doud and Skinner.

Q. Anybody else? Was Mr. Brown with you?

A. I think he was up in the room there.

Q. What did you do up in the Acorn rooms?

A. Spread the banner out and looked at it.

Q. Did you take the banner from that room to somewhere else?

A. Yes, sir.

Q. Where?

A. Over to the bank building.

Q. Did anybody tell you to take the banner over there to the bank building?

A. Mr. Skinner.

Q. State whether or not Mr. Skinner went with you.

A. He went out with us, out of the Acorn.

Q. Did anybody give you any instructions as to where to hang this banner?

A. Yes, sir.

Q. Who was that?

A. Mr. Skinner.

Q. What direction did he give you?

A. Told us where to put it and how to put it.

Q. Where did he tell you to put the banner?

A. From the Commercial Hotel to the bank building.

242 Q. Did he give you anything else, except the banner?

A. Yes, he got those hinges, or whatever you call them.

Q. They were delivered to you at the same time the banner was, were they?

A. I don't remember that exactly. Or it was shortly afterwards.

Q. Did you get permission from the bank building to suspend this banner on their building?

A. I left that to Mr. Skinner.

By Mr. Jones: That is objected to, and I move it be stricken out as not being responsive to the question.

By the Court: I suppose he means to say no.

By Mr. Miller: That may be stricken out.



Q. Did you get permission from the bank people to suspend this banner on their building?

A. No, sir.

Q. Did you get permission from Mr. Bensinger, the tenant of the Commercial Hotel, to suspend the banner on the hotel?

A. No, sir.

Q. Did you ask any of the owners or occupiers of these buildings for permission to suspend this banner?

A. No, sir.

243 Q. From whom did you get your directions to suspend the banner on the bank building and the hotel building?

A. Mr. Skinner.

Q. Do you remember about what time of day this was, in the forenoon or afternoon.

A. I don't remember exactly now, but I think it was in the forenoon.

Q. Was your brother, Vernon Johnston, with you at this time?

A. The first time?

Q. Yes?

A. No, sir.

Q. Was your father, H. B. Johnston, with you?

A. No, sir; not the first time.

Q. Did H. B. Johnston have anything to do with putting up this banner the first time?

A. No, sir.

Q. Did Vernon Johnston have anything to do with it the first time?

A. No, sir.

Q. Who did suspend the banner this first time?

A. Edgar Doud and I.

Q. Did you see J. F. Sober on the roof of the hotel the first time?

A. No, sir.

Q. Was he on the roof, so far as you know?

A. I didn't see him.

Q. Did you have any conversation with J. F. Sober on the roof of the hotel the first day this banner was put up?

A. No, sir.

Q. How did you attach the banner on the Commercial Hotel building that day?

A. The way Mr. Skinner told me.

244 Q. How was that? Just describe it.

A. With those hinges that he got.

Q. Did you have any conversation with anybody that day as to whether you would put this banner around the chimney or fasten it to those hinges?

A. No, sir.

Q. What kind of a cable or rope was used for suspending the banner that day?

A. It was a rope inside and wire out.

Q. A hemp rope inside, was it?

A. Yes, sir.

Q. How was that fastened on to this hinge?

A. There was an eye on the hinge to put it through and tie it?

Q. What do you mean by an eye in the hinge?

A. It was a flat hinge, or whatever you call it, and then a ring made in the end of it.

Q. A hole through the end of it?

A. Yes, sir.

Q. How did you fasten this rope, by running it through that hole?

A. Yes, sir.

Q. Do you know whether that rope subsequently cut off and left that end of the banner loose?

A. I didn't see it then.

Q. Do you know that the banner did come loose there?

A. I heard that it did.

Q. Did you have anything to do with putting up the banner the next time?

A. Yes, sir.

Q. Who assisted, in putting up the banner that time?

A. I don't remember exactly.

245 Q. Do you remember any person who was there?

A. My father was there.

Q. Who is your father?

A. H. B. Johnston.

Q. Did you get permission from anybody on that day to put the banner up on the Commercial hotel?

A. No, I didn't.

Q. Do you know whether anybody gave you directions to put it up there again that day?

A. I didn't have anything to do with it that day.

Q. Did you use this same hemp rope with the wire covering for suspending the banner the second day?

A. No, sir.

Q. What was used instead of that?

A. What we call a span wire.

Q. What was this span wire?

A. Wire about as thick as your finger, stiff wire.

Q. What was this wire fastened to that day on the Commercial Hotel building?

A. It was fastened on to the chimney next the roof, right down next the roof.

Q. Did you help to attach that rope to that flue?

A. I helped hold it that time. I just helped to hold it up, hold the wire.

Q. Do you mean that you helped pull the banner up, to hold it there, until the cable was fastened?

A. Yes, just held the slack up until they fastened it.

Q. Who fastened this wire cable around the flue?

A. I don't remember now. The fellows there, whoever they were.

Q. Do you know how many of your men were there assisting in putting this banner up that day?

A. No, I don't, at that time.

246 Q. Did you see how the cable was put around the flue?

A. Yes, I did.

Q. How was it put around the flue?

A. It was down a couple of times, I think, and then bolted with a clamp, right down, clamped down next the roof.

Q. What do you mean by being clamped; what is a clamp?

A. A clamp they use for clamping wire, an iron jigger; two pieces of iron with three holes in it.

— around the flue you brought the end of the wire back and clamped it around itself to hold it; is that the way?

A. Around the main wire.

Q. Is that what you mean by clamping it?

A. Yes, sir.

Q. You saw this flue there on the roof, did you?

A. Yes, sir.

Q. That was a brick flue?

A. Yes, sir.

Q. What was there around the bottom of this flue next to the roof of the building, if anything?

A. It looked like tar paper, or whatever it was, up a way. I don't know what was inside of it.

Q. You have heard the witnesses speak of tin flashing there. Was there a flashing around this flue?

A. They call it flashing, I guess. I don't know anything about it. It came up on the chimney aways.

Q. Where was this cable fastened around the flue with reference to the roof of the building?

A. Right down on the roof, as much as they could get it.

Q. Right down at the roof?

A. Yes.

247 Q. Was that cable fastened around the flue down at the roof, when you left the roof that day?

A. I didn't pay any attention to it after that. I didn't have anything to do with it.

Q. You saw it fastened around the flue?

A. I did.

Q. When you saw it, it was fastened down close to the roof?

A. Yes, sir.

Q. Is that all that you had to do with this cable?

A. Yes, sir.

Cross-examination.

By Mr. Jones:

Q. Do I understand that the only time you were on this roof for the purpose of suspending this banner and looking after it, was the first time when you clamped it with a cleat or tied it with a cleat, and the second time when you tied it around the chimney?

A. Yes, sir.

Q. Were you up there after that at all?

A. No, sir.

Q. Not at all?

A. No, sir.

Q. You weren't up there after the banner pulled the chimney down?

A. No, sir.

Q. You weren't up there to help take it down finally?

A. No, sir.

248 Q. So that we are correct in understanding you as the only times you were there was the time when you first put it up, and then the time when you made the change and tied it to the chimney?

A. Yes, sir.

Q. How long after you first fastened it to the cleat on the roof, was it you fastened it to the chimney?

A. I don't remember that now.

Q. Do you remember approximately?

A. No, I don't now.

Q. A day or two, or a week?

A. I don't remember just how long it was.

Q. Where did you get your order to put it up the second time,—the same place you got the first order?

A. I didn't get the order the second time.

Q. Who got the order the second time?

A. I don't know that.

Q. Your father had charge of the men the second time?

A. Yes, sir.

Q. Your father was a foreman of the Light company?

A. Yes, sir.

Q. You say your father wasn't with you the first time?

A. No, sir.

Q. Just you and Doud?

A. Yes.

Q. When you and Doud received the banner from Skinner, he didn't go along to the hotel with you, he merely went out of the Acorn club rooms with you; isn't that correct?

A. Who?

249 Q. When you and Doud received the banner up in the Acorn club rooms, Skinner only went out of the rooms with you?

A. Yes.

Q. He didn't go to the hotel with you?

A. No.

Q. He didn't go up on the roof with you?

A. No, sir.

Q. The directions Skinner gave you as to how and where to erect this banner, were all given you in the Acorn club rooms, were they not?

A. I don't remember that exactly.

Q. Did he give you any directions on the street when he left you?

A. He told us how to do it, but I don't remember just where he told us.

Q. None of the directions were given you at the hotel, were they?

A. I don't remember that exactly.

Q. He didn't go to the hotel with you, did he?

A. No, he didn't.

Q. And he wasn't on the roof with you?

A. No, sir.

Q. Did you ever see him on the roof?

A. No, sir.

Q. Now, when you went there with Doud, you went to the roof of the hotel; is that correct?

A. Yes, sir.

Q. Did you say anything to anybody in the hotel when you were going to the roof?

A. No, sir.

Q. Did you ask if any permission had been obtained by any one to suspend the banner from the hotel?

A. No, sir.

250 Q. You didn't inquire anything about that at all?

A. No, sir.

Q. Did you ask whether you might go to the roof?

A. No, sir.

Q. What did you do?

A. Just went to the roof.

Q. You knew the way up there yourself?

A. Yes, sir.

Q. And you went up. Did you take the banner with you? Who was carrying the banner?

A. I had the banner myself.

Q. Did you take it with you to the roof?

A. I don't remember whether I took it to the roof or whether I pulled it up from the street.

Q. Can you recall whether or not you took the banner to the roof with you, or left it down on the street below?

A. No, sir.

Q. You remember receiving it at the Acorn club rooms?

A. Yes, sir.

Q. You remember carrying it to the hotel?

A. Yes.

Q. Can't you remember whether you dropped it off your shoulder or whether you carried it on up to the roof of the hotel?

A. No, can't remember exactly.

Q. You have no recollection about that at all?

A. No, sir.

Q. When you got to the roof or the hotel, what did you do with respect to making a fastening for the banner? Did you tie it around the chimney, the first time?

A. No.

251 Q. You didn't tie it around the chimney the first time?

A. No, sir.

Q. You took the cleat that Mr. Skinner had furnished you, and fastened that to the roof?

A. Yes, sir.

Q. That cleat was a long iron strap hinge, was it not?

A. Yes, sir.

Q. Might it not be called a strap hinge?

A. Yes, sir.

Q. It was a piece of strap iron rolled up at the end so as to make a hole through the end?

A. Yes, sir.

Q. The hole was closed around there, was it not; the iron was bent clear around on itself?

A. Yes.

Q. And holes were bored through the iron so as to permit screws to be driven down through the iron into the roof?

A. Yes.

Q. While you were there you took this cleat and laid it on the roof and put the schrews down into the roof?

A. Yes, sir.

Q. Where did you get the end of the cable which you fastened to the cleat? Did you have that with you, or did you draw it up?

A. I don't remember exactly.

Q. But anyway, whatever you did, whether you had it with you on the roof, or drew it up from below, you made your fastening to the cleat that day?

A. Yes, sir.

Q. Now, the roof of this hotel building, I understand, slopes back from the eaves. Is that correct—a slight slope?

A. Yes, sir.

Q. So that the highest part of the roof where your cable, in coming from the cleat would go over the edge of the roof, was at the edge of the roof?

A. Yes, sir.

Q. After you fastened this wire rope, I understand the first was—or what was it?

A. A rope with wire around it.

Q. What did you first fasten to the cleat; what was it you fastened to the cleat?

A. That wire rope.

Q. But that wasn't the one that was used to fasten around the chimney?

A. No, sir.

Q. Later, was it?

A. No, sir.

Q. But the wire rope you fastened to the cleat held the banner, did it not?

A. Yes, sir.

Q. How did you fasten the banner at the bottom?

A. With other ropes.

Q. Where did you fasten those other ropes?

A. On the window sills.

Q. A story or two below?

A. Yes, sir.

Q. Did you put screws in the window sills?

A. Screw-eyes.

Q. And fastened the bottom corners of the banner down tight to the screw-eyes? Did you do that on both sides of the street?

A. Yes, sir.

Q. And you fastened the top side of the banner on the  
253 opposite side of the street to the Deposit National Bank building.

A. Yes, sir.

Q. So that the banner was fastened tightly at the four corners when you finished it?

A. Yes, sir.

Q. When you went there and performed the work, the first part of the work of suspending the banner, you carried out the directions that came with the banner as to the use of the cleat, as being a fastening for the banner, did you not?

A. Just as Mr. Skinner told me to do.

Q. Those are the directions which came with the banner, weren't they?

A. Yes, sir.

Q. And they were printed directions that came with the banner that were given to you?

A. No, sir.

Q. Didn't you see them?

A. No, sir.

Q. The directions that were given you, were that you should use the cleat to fasten to the roof and fasten the banner to that, were they?

A. Yes.

Q. And that is what you say you did?

A. Yes.

Q. And if this banner had been continued there with that fastening on the cleat, it never could have pulled the chimney over, could it?

By Mr. Miller: Objected to.

254 By the Court: Objection sustained.

Q. When you went to the Acorn club rooms to get this banner, where did you get your written order?

By Mr. Miller: Objected to unless the witness is asked whether he had a written order.

By the Court: I believe he said he had an order the first time.

By Mr. Jones:

Q. Did I not understand you to testify that you got an order marked to suspend a banner, or a political banner, the first time?

A. There was an order in the office.

Q. What did that order say?

A. It said, "Hang banner."

Q. Where did you get that order?



A. I just looked at it in the office there.

Q. Where was it when you looked at it?

A. In the order book, I think.

Q. That was before you went to the Acorn club rooms?

A. Yes, sir.

Q. You got that written order in the office and then you proceeded to the Acorn rooms. Is that correct?

A. Yes, sir.

Q. Do you recollect what day of the month it was that you first erected the banner?

A. No, I don't remember now.

255 Q. Always when you speak of the first time you erected the banner, you mean the time that you got it at the Acorn club rooms and took it to the hotel and fastened it to the cleat on the roof of the hotel?

A. Yes, sir.

Q. That was the first time?

A. Yes, sir.

Q. And that all happened in one day; that is, I mean your getting the order and going to the Acorn club rooms and going to the hotel and fastening the cleat to the roof, was all done in one day?

A. Yes, sir.

Q. That work didn't spread over two days?

A. No.

Q. It was all done in one day, and that was the first time that you mean?

A. Yes, sir.

Q. The second time was the first time that the banner was fastened to the chimney. Is that correct?

A. Yes, sir.

Q. The second time you were there was the first time it was put to the chimney? The first time you were there it was put to the cleat, and the second time it was fastened about the chimney?

A. Yes, sir.

Q. Those are the only two times that you were on the roof?

A. Yes, sir.

Q. And you are sure that you were there both those times?

A. Yes, sir.

Q. That flashing you speak of flares up from the roof to the side of the chimney, does it not?

A. I don't remember that.

256 Q. You remember the character of the flashing? You have told us that. Didn't you say there was tar paper up, but you didn't know what was under it? Didn't you testify to that?

A. Yes.

Q. You know the character of the flashing?

A. Not exactly, no.

Q. To that extent you know you fastened the cable down around the flashing. Now can't you tell us whether or not the flashing flares up from the roof in that shape (indicating), growing narrower as it goes up alongside of the chimney?

A. I couldn't say that now.

Q. Can't say whether it does or not?

A. I couldn't, no.

Q. And if that fastening cable were put around the flashing at the bottom of the chimney, the cable would then go in an upward direction to the edge of the roof, would it not? The edge of the roof was higher than the bottom of the chimney, wasn't it?

A. Yes, sir.

Q. The roof sloped back?

A. Yes, sir.

Q. So that if you put that around the flashing down at the bottom of the chimney, the cable would come up to go over the edge of the roof, wouldn't it?

A. Yes, sir.

Q. Then the weight of the banner was sufficient to make the cable sag to some extent between the two buildings, wasn't it?

A. I don't remember a sag.

Q. Do you remember whether or not the cable was directly taut across the street on a plumb level, do you?

A. Not exactly, no.

257 Q. Can't you recollect that the weight of that banner sagged the cable to some extent between the two buildings?

A. That banner wouldn't have much weight on that wire we put up.

Q. Why wouldn't it have much weight?

A. A different wire than before.

Q. And it was pulled tightly?

A. Yes, sir.

Q. Pulled tightly, and the banner weighed 35 pounds; you know that?

A. I don't know that.

Q. You know it weighs at least that, don't you? You carried it

A. I don't know what it weighed.

Q. You could estimate it weighed at least that, from carrying it. You carried it from the Acorn club rooms to the hotel?

A. It may be that.

Q. And you know it was fastened at four corners, and it had terrific pull in the wind, don't you?

A. I know it was fastened at the corners.

Q. And don't you know that all of that together would be a pull on that taut cable that you put across there and fastened to the chimney?

By Mr. Miller: That is objected to as not cross-examination.

By the Court: Objection sustained.

By Mr. Jones:

Q. How did you draw that cable across there?

A. The first time, you mean?

258 Q. No, the time you fastened it to the chimney?

A. I don't remember that now.

Q. You said you were pulling on it, taking it up?

A. I said I helped hold it.

Q. You say it pulled across. How was it stretched across there? It was a stiff cable, wasn't it?

A. Yes.

Q. Pretty stiff wire cable?

A. Yes, sir.

Q. How thick?

A. About as thick as your finger.

Q. Which finger?

A. That one (indicating).

Q. My middle finger?

A. Yes.

Q. The second finger?

A. Yes.

Q. About as thick as your second finger?

A. Yes.

Q. What was it made of?

A. Galvanized wire.

Q. And you pulled that across the street and stretched it tight. Now, how did you stretch it tight? Did you stretch it tight with your hands?

A. I don't remember that.

Q. You don't remember whether you stretched it tight with your hands?

A. No, I don't.

Q. Do you think you could stretch it tight with your hands?

A. No, I don't think I could myself.

Q. And you did use a block and tackle to stretch it across there?

A. We may have used it. I don't remember.

350 Q. Didn't you fasten a block and tackle to the base of the chimney while you pulled this wire across, and then clamped it around there?

A. No, sir.

Q. Where did you fasten the block and tackle, if you used one?

A. I don't remember.

Q. You don't think it would be possible to stretch it tight enough with your hands, do you?

A. I couldn't, no.

Q. You didn't?

A. I don't remember that.

Q. You were holding up the slack?

A. There were others there besides me.

Q. Well, who was taking it? You have testified as to where it was placed and all around the chimney. We would like to know exactly how you pulled it across there?

A. I don't remember just how we pulled it across. I just remember that I helped hold it there.

Q. Is that all you did, just held it?

A. Yes.

Q. Nothing more than that?

A. No, sir, not the second time I didn't.

Q. Was there any one helping you to hold it?

A. There were other fellows there.

Q. They were helping to hold it too?

A. Yes.

Q. You couldn't hold it alone, could you?

A. Not hold it tight.

Q. If you couldn't stretch it tight yourself, you could hardly hold it tight yourself, could you?

A. No, sir.

260 Q. Did you say that Mr. Sober didn't come over and talk to you on the roof of the hotel?

A. No, sir.

Q. Did you see Mr. Sober working on the roof of the hotel?

A. No, sir; I didn't.

Q. You won't say he wasn't on the roof of the hotel, will you?

A. I didn't see him there.

Q. But I say, you won't say he wasn't on the roof of the hotel that day?

A. I didn't see him on the roof of the hotel.

Q. All you will say is that he didn't come to you on the roof of the hotel and talk to you about what you were going to do that?

A. No, sir; he didn't.

Q. And that you didn't see him on the roof of the hotel?

A. I didn't see him.

Q. But you are willing to say that he didn't talk to you about that, and that you didn't suggest the idea as to whether you would fasten it to the cleat or the chimney?

A. I didn't speak to him about it.

Q. You started to erect this banner from the side of the Deposit National Bank first, didn't you?

A. Started to, yes.

Q. And stopped didn't you?

A. Yes, sir.

Q. You stopped because Major — of the bank told you no permission had been obtained, didn't you?

A. No, sir.

261 Q. The cashier of the bank—you stopped because the cashier of the bank told you no permission had been obtained, didn't you?

A. He didn't tell me, no.

Q. Whom did he tell?

A. I don't know.

Q. Who told you?

A. Mr. Moore.

Q. Who is Mr. Moore?

A. The superintendent of the building, I think.

Q. And then, when did you finish putting it up on that side?

A. That day; the same day.

Q. How much later on that day?

A. I couldn't remember now.

- Q. You went there first in the morning?
- A. I don't remember just exactly about that. It was that day me time.
- Q. Who told you to go back and put it up at the bank?
- A. Mr. Skinner.
- Q. Where did you see him?
- A. I don't remember where I seen him.
- Q. But you remember it was he?
- A. I remember of him telling me.
- Q. What did he tell you?
- A. To go ahead and put it up.
- Q. When?
- A. That day.
- Q. That day?
- A. Yes, sir.
- Q. Where was it he told you?
- A. I don't remember.
- Q. You say he told you, but you don't remember he told you?
- A. I remember he said to go ahead and put it up, because I put it up.
- Q. Everything you remember you did about this, Skinner told you. That is your recollection?
- A. Yes.
- Q. At all times?
- A. Yes.
- Q. And then you did see Skinner after you left him at the Acorn Club rooms before you got the banner erected?
- A. Yes, sir.
- Q. And when did you go to the hotel after you had been stopped at the bank, how soon after?
- A. I don't remember just exactly how soon after.
- Q. Did you finish putting it up on the bank side before you went over to the hotel?
- A. I can't remember.
- Q. You don't remember?
- A. No.
- Q. You don't remember that?
- A. No.
- Q. You don't remember when you put it up on the side of the bank then, do you?
- A. Not exactly, no.
- Q. Was it before or after you fastened it to the hotel side?
- A. I can't say, exactly.
- Q. How is it you can remember you got directions to go ahead and put it up on the bank side, and you can't remember whether it was before or after you had gone across to the hotel?
- A. I just told you what I remember.
- Q. You don't remember?
- A. No.
- Q. And you don't remember whether you were held up an hour or a day on the bank side then, do you?

A. Yes, I remember it was done that day.

Q. How long was it?

A. I don't remember that.

Q. It could have been the whole day, then, couldn't it?

A. No, because we put the banner up that day.

Q. It may have been the whole of that day if you started the beginning of the morning?

By Mr. Miller: I submit the question is not fair, because it couldn't have been held up the whole day.

By the Court: He said he completed it that day, and the particular way would not matter very much.

By Mr. Jones:

Q. Was it an hour or five hours that you were held up on the bank side?

By Mr. Miller: I submit that the witness has said several times he does not know how long it was, and we object to any further presenting of that feature of the case.

By the Court: He may answer this question.

A. I don't know.

264 By Mr. Jones:

Q. You don't remember?

A. No, sir.

Q. You don't remember how long you were held up on the bank side? You don't know whether you went to the hotel before you finished on the bank side after you were held up; you don't remember whether you pulled it across with block and tackle; you don't remember who the other men were with you on the roof, aside from your father. There isn't much you do remember, aside from the fact that you just did what Mr. Skinner told you, is there?

A. I remember just what I told you.

Q. And there isn't much you remember, aside from what you say he told you?

By Mr. Miller: Objected to.

By the Court: Objection sustained.

By Mr. Jones: I would like to have the benefit of the witness's information, for the issues of this case, and I want to know whether his recollection serves him only to that one extent.

By the Court: You can get the facts.

265 By Mr. Jones:

Q. Now, the time that you went there and fastened it to the cleat, and the time you fastened it to the chimney, were the only two times you were there?

A. Yes.

Q. And the time you were last there was the time you helped hold it, and they fastened it to the chimney?

A. Yes, sir.

Q. And that was before the banner pulled the chimney over, wasn't it?

A. Yes, sir.

Q. How long was that before the chimney came over, that you held it while they fastened it?

A. I couldn't say that.

Q. You don't remember?

A. No, sir.

Q. Do you remember approximately?

A. No, sir.

Q. But it was some time before?

A. Yes.

Q. Was it a day before?

A. I couldn't say; I don't remember.

Q. And you can't say that the time you fastened it to the chimney wasn't the day of the accident, can you?

A. No, I can't.

Q. Might it have been the day of the accident?

By Mr. Miller: Objected to.

266 By the Court: He may answer whether it was the day of the accident. Beyond that he doesn't seem to remember.

By the Court:

Q. Was it the day of the accident, if you remember?

A. I don't remember whether it was the day of the accident or whether it was after the accident.

By Mr. Jones:

Q. It was at least before the chimney came over, though, wasn't it?

A. It was before the chimney came over, yes.

Q. And what were you doing in the hotel after the chimney came over?

By Mr. Miller: I don't understand he said he was in the hotel.

By Mr. Jones:

Q. Were you in the hotel after the chimney came over?

A. No, sir; not after the chimney came over.

Q. Were you in the hotel when the chimney did come over?

A. No, sir.

Q. Were you in the hotel immediately prior to the time the chimney came over?

A. No, sir.

Q. Weren't you in the hotel at the time the chimney fell?

A. No, sir.



267 Q. Weren't you in the hotel immediately after the chimney fell?

A. No, sir.

Q. Will you say that you did not go down the stairs in the hotel at the time they were carrying Mr. Pancoast to his room?

A. No, sir; I didn't.

Q. You didn't?

A. No, sir.

Q. And you are willing to so testify?

A. Yes, sir.

Q. You didn't go down the stairway of that hotel at the time they were carrying Mr. Pancoast, injured from the fall of the bricks, carrying him to his room in the hotel?

A. No, I didn't.

Q. Did you ever know of the lower side of the banner coming loose on either side of the street?

By Mr. Miller: That is objected to as not being cross-examination.

By the Court: He has said he wasn't back there. It is outside of the examination in chief.

By Mr. Jones:

Q. Did you have anything to do with the banner other than the fastening to the cleat and the fastening to the chimney?

By Mr. Miller: Objected to.

268 By the Court: Objection sustained.

Redirect examination.

By Mr. Miller:

Q. Do you recall the date when Mr. Pancoast received an injury?

A. No, sir.

Q. Do you know where you were that day?

A. No, I can't remember where I was.

Q. You say that Mr. Moore first told you that you couldn't put that banner up on the bank building?

A. Yes, sir.

Q. What did you do after you received that notice, if anything?

A. I don't remember just what.

Q. Did you make a report of that to any person?

By Mr. Jones: Objected to as being leading. The witness said he doesn't remember.

By the Court: He can't say whether he reported the fact to anybody.

A. I don't remember,

By Mr. Miller:

Q. The second day that you were up on the roof, did you see J. F. Sober or Frank Sober that day?

A. No, sir; I didn't.

269 Q. So far as you know, was Mr. Sober on the roof of the hotel the second day you were there?

A. He wasn't that I know.

Q. Did you have any conversation with Mr. Sober on the roof of the hotel while you were there the second day?

A. No, sir.

Q. Did you hear him have a conversation with anybody else on the roof of the hotel while you were there the second day?

A. No, sir.

By a Juror: How old was he in 1912?

By Mr. Miller:

Q. How old are you now?

A. Twenty-five.

Q. When is your birthday?

A. In August.

Q. You will be twenty-six next August?

A. Yes, sir.

Q. The 25th of next August?

A. In 1892 I was born. Twenty-five the 25th of next August.

Q. Then you were twenty years of age in 1912?

A. Yes, sir.

270

*Testimony of H. B. Johnston.*

H. B. JOHNSTON, a witness called on behalf of defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Where do you live?

A. Dubois.

Q. Where were you living in October of 1912?

A. Dubois.

Q. Were you employed at that time by the Dubois Electric Company?

A. Yes, sir.

Q. What was your connection with the company?

A. Foreman.

Q. Did you have anything to do with putting up this banner the first time?

A. No, sir.

Q. Did you have anything to do with putting up the banner the second time?

A. Yes, sir.

Q. Do you recall the fact that it was put up once and then the end came loose and it was put up again after that?

A. Yes, sir; I saw it hanging across the street.

Q. Were you at the Commercial Hotel to assist in any way in putting up this banner the first day?

A. No, sir.

271 Q. What did you have to do with hanging the banner the second time?

A. Fastening one end on the Commercial.

Q. How did you happen to go there and do this work?

A. One of the men came after me, where I was working.

Q. Where were you working?

A. At the glass factory.

Q. Who was it came after you?

A. Vernon Johnston.

Q. Is he a son of yours?

A. Yes, sir.

Q. Do you recall about what time of day this was?

A. I think it was after dinner shortly.

Q. What did you do with reference to this banner then?

A. We put the new rope on and fastened—

Q. Where did you go first?

A. To the Commercial.

Q. Who was there with you?

A. Mr. Johnston and Mr. Wilson, I think; two other men of the company.

Q. What did you do towards suspending the banner?

A. Put the new rope through to suspend it.

Q. Was this a rope or a wire?

A. A wire rope.

Q. What kind of wire was it?

A. It was what you call a quarter galvanized span wire.

Q. Solid wire?

A. No, sir. It was flexible, six or eight strands wrapped together.

272 Q. Where did you fasten that on the Commercial hotel side?

A. Around the flashing of the chimney.

Q. Do you know how the banner was drawn up so as to be able to make the fastening?

A. We drew it up with a small pair of blocks.

Q. Who had charge of that?

A. I had.

Q. Did you draw the banner up tight?

A. Yes, sir.

Q. After you had it drawn up with a small pair of blocks how did you fasten it?

A. Put the wire around the chimney twice and clamped it to the other end, that ran across the street, with what you call a guy clamp.

Q. What do you mean by a clamp? What did you clamp it to?

A. The end that went around the chimney, to the other end.

Q. Do you mean by clamping, that you wound that loose end around the main cable?

A. No. Brought it around the chimney and clamped it to this suspended across the street.

Q. What did you use to clamp the wire?

A. What is called a guy clamp, a piece of iron three—

Q. How do you fasten that piece of iron?

A. There is creases in it; you clamp it on the wire; holes there.

Q. And that makes a loop?

A. Yes, sir.

Q. Whereabouts on this chimney did you fasten that wire?

A. Around the flashing at the bottom of the chimney.

273 Q. Who put that wire around the flue?

A. I think I did.

Q. How many times did you wrap it around?

A. Twice.

Q. Did you see a flashing on this flue?

A. Yes, sir.

Q. Where was this wire wrapped, in reference to that flashing?

A. Around the bottom of the flashing.

Q. Where was the wire wrapped, in reference to the roof of the hotel?

A. How is that?

Q. Where was the wire wrapped, in reference to the roof of the hotel?

A. Around the bottom of the flashing.

Q. When you wrapped it there around that flue in your opinion was or was not that a safe place to make this attachment?

By Mr. Jones: Objected to as calling for a conclusion of the witness. The witness is not competent to testify.

By Mr. Miller:

Q. Did you see Frank Sober on the roof of the hotel the day you were there?

A. No, sir.

Q. Did you have any conversation with him that day?

A. No, sir.

Q. Did you see any of his men on the roof of the hotel?

A. No, sir.

274 Q. Did any of his men have any conversation with you about hanging this banner?

A. No, sir.

## Cross-examination.

By Mr. Jones:

Q. The first time that you were up there, with respect to this banner, was the time that it was fastened to the chimney?

A. Yes, sir.

Q. And that was the second time that the banner had been fastened by the Light Company to that side of the street?

A. Yes, sir.

Q. So that if Mr. Sober was up there when your men went up there the first time, he wouldn't have been there when you were there, would he? If Mr. Sober was there the first time your men were there, he wouldn't have been there when you were there?

By Mr. Miller: Objected to.

By the Court: Objection sustained.

By Mr. Jones:

Q. The only time you were there was the second time?

A. Before it came down?

275 Q. Yes.

A. Yes, sir.

Q. Did you hear Mr. Sober's testimony?

A. Yes, sir.

Q. He did not say that he was there when you were there, did he?

By Mr. Miller: Objected to.

By the Court: Objection sustained.

By Mr. Jones:

Q. The first time you were there was the second time that your company fastened the banner?

A. Yes.

Q. You were working at the Glass Company when you were first summoned to go and fix the banner?

A. Yes, sir.

Q. Where was that glass company?

A. I believe the south end of the city.

Q. It was right in Dubois?

A. Yes, sir.

Q. And your son Vernon came for you?

A. Yes, sir.

Q. What did he tell you?

A. Told me that they wanted that banner fastened back and he couldn't get it across, and wanted me to come over and help; something to that effect.

Q. Where did you get the wire that you used that time?

A. I think it was brought from the power house.

Q. What power house?

A. Of the Dubois Traction.

276 Q. Who brought it from there, do you know?

A. I don't know that.

Q. Who gave it to you?

A. One of the men, but I couldn't say who, which one.

Q. You say you were foreman for the Light Company?

A. Yes, sir.

Q. Didn't you also do work for the Traction company?

A. Yes, sir.

Q. Your duties were performed for both companies?

A. Yes, sir.

Q. Their offices were at the same place?

A. Yes, sir.

Q. And you received your orders at the same place?

A. Yes, sir.

Q. Who did you have with you when you went to the roof and fastened it to the chimney; that is, whom did you take up there, of the employees?

A. They had been up. I went with them.

Q. Whom did you find there?

A. Mr. Johnston and Mr. Wilson, I think, was the two.

Q. Which Mr. Johnston?

A. Vernon.

Q. Were they there when you got there? You say Vernon came for you at the glass plant. Did you return with Vernon?

A. Yes, sir.

Q. And you both went to the roof of the hotel?

A. Yes, sir.

277 Q. And then you went there with Vernon and Mr. Wilson?

A. Yes, sir.

Q. What Mr. Wilson is that?

A. Ed. Wilson.

Q. Then where did you get this pair of blocks that you speak of? Did they have them there, or not?

A. I am not sure whether they had them or whether we sent and got them. I couldn't say.

Q. But you did get a pair of blocks. Where did you fasten the blocks?

A. We fastened them on the wire. There were clamps on those blocks for slipping on the wire any place you want to.

Q. You fastened one block on the wire?

A. On the wire that went across the street, and the other on the loose end so that it would pull those up tight.

Q. Then where did you fasten the snubber for your blocks, the base of it?

A. On the same wire. There are two clamps for slipping on the wire.

Q. I just would like you to explain exactly how you fastened

those clamps to the wire, and what you pulled against when you drew on the blocks?

A. You pulled on your rope. One of those blocks you put across on the wire. Suppose this is the wire going across the street; you would slip a clamp on there and wind it around the flue, and this end is loose and you slip a clamp on there and the block is pulled together, and it draws it up tight.

Q. You had already put the wire around the chimney before you put the blocks on?

A. Yes, sir.

278 Q. Supposing this is the chimney, and you bring the wire from across the street; as I understand you, you would put a clamp here on the body of the wire before you go to the chimney?

A. Yes, what you call a "come-on".

Q. Then you wound the wire around the chimney, and in this case you wound it around twice?

A. Yes.

Q. Then you would put a clamp on the loose end of the wire?

A. Yes, sir.

Q. Then you would arrange your blocks between the "come-on" out here and the clamp on the end of the wire, and then you would put your rope between the blocks, and you would pull on that?

A. Yes, sir.

Q. And when pulling that wire up tight, it was pulling on the fastening around the chimney?

A. On the wire around the chimney, yes.

Q. Where was that wire when you were pulling it up?

A. Around the flashing of the chimney.

Q. At the time you were pulling it up?

A. Yes, sir.

Q. Didn't you tramp it down around the flashing after you had it pulled up?

A. As we pulled it around, we kept it down.

Q. It would slip up?

A. No, sir. It just stayed around, and we clamped it close around the bottom.

Q. But didn't you testify before that you tramped it down around the bottom? Just what did you do?

A. We clamped it around the chimney with the clamp.

279 Q. At the place where you first wound it around the chimney, and there it remained all the time?

A. Yes, sir. We may have tramped it down; I am not just positive now.

Q. You were up there after you fastened it to the chimney, were you not, later?

A. Yes, sir.

Q. How often were you up there from the time you fastened it around the chimney until the day the chimney came over?

A. Once; one time.

Q. When was that?



A. I think, October 12th.

Q. Was that the day of the accident.

A. Yes, sir.

Q. It was before the chimney pulled over, was it?

A. Yes, sir.

Q. What time of the day was that when you were there?

A. In the forenoon.

Q. What were you doing there at that time?

A. They had a string of lights strung along in front of that banner, to light it up; putting up lights.

Q. You were stringing those lights to illuminate this very banner?

A. Yes, sir.

Q. Were you close to the chimney at the time you were working there on the lights, that is, the flue to which you had made your fastening?

A. Yes, sir.

Q. Working right about it there?

A. Yes, sir.

Q. Did you observe the fastening about the chimney that day?

A. Yes, sir.

Q. Where was that fastening?

A. Down around the bottom, the same as we had put it.

Q. Was it in the same place you had put it?

A. Yes, sir.

Q. The day of the accident you say that the fastening was around the chimney just as you had put it, the day you first put it there?

A. As near as I can remember, yes.

Q. You remember the accident, do you, the pulling over of the chimney?

A. I didn't see it going over, no sir.

Q. You remember that it occurred?

A. Yes, sir.

Q. Were you there at any time after it occurred?

A. On the roof?

Q. Yes, or in the street below.

A. Yes, sir.

Q. How soon after it pulled down?

A. I suppose five or ten minutes; just a short time afterwards.

Q. Did you see this cable to which the banner was fastened, that is, the part that had been around the chimney?

A. At that time, you mean?

Q. Yes, after it came down.

A. Yes, sir.

Q. What was the condition of that wire with respect to the loop you had made in it? Was the loop intact?

A. Yes, sir.

Q. It was not broken?

A. No, sir.

Q. And it was down and over the side of the roof?

A. Yes, sir; the one end.

Q. That is, the end that had been fastened to the chimney?

A. Yes.

Q. Was it after the chimney came over down over the side of the roof?

A. Yes, sir.

Q. And when you saw it after it was down over the side of the roof, the whole fastening, the loop and all, was intact?

A. Yes, sir.

Q. Unbroken?

A. Yes, sir.

Q. Don't you know that that cable fastening was around the chimney some distance above the flashing?

A. No, sir.

Q. And didn't you so state in conversation with Mr. Harvey Sober?

A. I did not.

By Mr. Miller: That is objected to as being irrelevant and immaterial and incompetent.

By the Court: If he fixes the time and place where an alleged conversation occurred, inconsistent with his present testimony, you might ask if he didn't so state for the purpose of contradiction only.

282 By Mr. Jones:

Q. Do you remember having a conversation with Harvey Sober about that banner fastening, shortly after you had put it there and before the accident?

By Mr. Miller: I now object to the testimony, because it is irrelevant and immaterial and because if the witness should deny that he had such conversation he cannot be contradicted on an immaterial point. We further object to it because it is an attempt to prove a declaration of an agent, to bind his principal after the act has been performed by the agent, and, therefore, is incompetent.

By the Court: The location of the cable on the chimney being a matter of dispute, and material, perhaps, on the question of negligence, and the witness having testified that the cable was fastened to the chimney at the roof, it would be competent to show that he made a statement inconsistent with his testimony to some witness, simply as affecting his credibility as a witness, and for no other purpose. For this purpose, the testimony is competent, and the objection is overruled and exception noted to defendant.

(Question read.)

A. No, sir.

By Mr. Jones:

Q. You know Mr. Harvey Sober, don't you?

A. Yes, sir.

Q. What is his business?

283 By Mr. Miller: Objected to as immaterial and irrelevant.  
By the Court: If there was any conversation—put the question to him.

By Mr. Jones:

Q. You know Mr. Harvey Sober, do you?

A. Yes, sir.

Q. Didn't you meet Mr. Harvey Sober after you had fastened the banner to the chimney, and didn't you talk to him about the fastening, and didn't he say to you that that was not a safe way to tie it, a safe place to tie it, and that it would come down—that is, to tie it around the chimney—and that it would come down as sure as the devil?

By Mr. Miller: We further object to this testimony because it does not propose to prove a declaration made by the witness, but proposes to prove a statement made by W. H. Sober to the witness after the completion of this work, and, therefore, it is incompetent, irrelevant and immaterial.

By Mr. Jones:

Q. Didn't you have a conversation with Mr. Harvey Sober between the time you fastened the banner to the chimney and the day the chimney came over in which the position of the fastening above the flashing was talked about by you and Mr. Sober,  
284 and that Mr. Sober stated to you that that would come over as sure as the devil?

By Mr. Miller: Objected to as being incompetent, irrelevant and immaterial.

By the Court: I think the objection will have to be sustained, there being no issue raised between the witness as to his present position and some statement inconsistent with that, and, therefore, it would appear to be irrelevant and immaterial.

By Mr. Jones: I wish to show by the contradiction shown by the testimony of Mr. Sober, that Mr. Johnston between those times in conversation with Mr. Sober, talked about its being at a place other than safe.

By the Court: If the conversation was as to the location, it is clearly competent; if not as to the location, it would be irrelevant.

By Mr. Jones:

Q. I asked you whether you didn't have a conversation with Mr. Harvey Sober between the time that you fastened this banner to the chimney, and the time that the chimney came over, in which the location of the fastenings as above the flashing was discussed by you and Mr. Sober.

285 By Mr. Miller: Objected to.

By the Court: You could first ask if there was any discussion as to the location.

By Mr. Jones: I am asking whether there was a discussion.

By the Court: You ought to fix the place, too.

By Mr. Miller: I have an objection on the record.

By the Court: The objection is overruled, and exception noted to defendant. This is a preliminary question.

A. No, sir; I don't remember of any.

By Mr. Jones:

Q. You didn't have any such conversation at the time specified?

A. No, sir.

By Mr. Miller: I ask the Court to remember there is no time specified in that question.

286 By the Court: This is preliminary.

By Mr. Jones: I am specifying that it is between the erection of the banner and the date of the accident.

By Mr. Jones:

Q. Did you have any conversation with Harvey Sober between the time you fastened the banner to the chimney, and the date of the chimney came over?

By Mr. Miller: Objected to as immaterial.

By the Court: That may be answered as a preliminary question.

A. No, sir; not to my knowledge.

By Mr. Jones:

Q. Would you say that you didn't have any conversation with Harvey Sober about the location of the banner, between the time that you fastened it there and the date that the chimney came over, while standing on the street, Long avenue, by the Commercial Hotel, while in view of the banner?

A. I don't remember of any, no, sir.

Q. Did you have anything to do with the banner after the chimney came over?

By Mr. Miller: Objected to as immaterial and irrelevant.

287 By the Court: There has been no testimony given on the subject. The objection is sustained.

By Mr. Jones:

Q. Did you have anything to do with the banner other than fastening it to the chimney, prior to the pulling over of the chimney?

By Mr. Miller: Objected to as irrelevant and immaterial, and not cross-examination.

By the Court: I think the objection will have to be sustained.

By Mr. Jones:

Q. Did you fasten a lower corner of the banner before the accident?

A. Not to my knowledge.

Q. You don't recollect having done that?

A. No, sir.

Redirect examination.

By Mr. Miller:

Q. These lights you put up, were they strung on the banner?

A. Across the street?

288 Q. Yes.

A. No, sir.

Q. How far away from the banner were they?

A. Eighteen or twenty inches.

Q. How were those lights suspended, on what?

A. One end on the bank building and the other end on to the roof of the Commercial Hotel.

Q. Was the end on the hotel building attached to this flue?

A. No, sir.

Q. Was there a string of lights on each side of the banner, or only on the one?

A. On the one side, facing Long avenue—or Brady street, rather.

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*Testimony of Harry Vernon Johnston.*

HARRY VERNON JOHNSTON, a witness called on behalf of defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Where do you live?

A. Dubois.

Q. Were you living there in October of 1912?

A. Yes, sir.

Q. For whom were you working?

A. Dubois Electric Company.

Q. Did you have anything to do with the hanging of this banner?

A. Yes, sir.

Q. Did you have anything to do with hanging it on the first day?

A. No, sir.

Q. What did you have to do with the hanging of it on the second day?

A. I helped to put it around the chimney.

Q. Do you remember whether anybody gave you any orders or requests about putting up this banner the second day?

A. Yes, sir.

Q. Do you know where that was, that you received it?

A. Yes, sir.

290 Q. Where?

A. In the Electric Company's office.

Q. From whom did you receive the order or request?

A. Mr. Skinner.

Q. Is that Morris O. Skinner?

A. Yes, sir.

Q. When was this?

A. October 7th.

Q. What time of day, in the forenoon or the afternoon?

A. Right after dinner, I think; about 1:30.

Q. Was that when you first received the order?

A. Yes, sir.

Q. What did you do in reference to that?

A. There was another employee by the name of Wilson, and I took a fishing rod and went up and tried to hook the end up, but it was too windy and we couldn't get hold of it, so we came down and reported it to the office.

Q. To whom did you report?

A. Irvin Blakesley, assistant superintendent.

Q. What directions, if any, did he give you?

A. He said to let it go; we didn't have to take care of it.

Q. Where had Mr. Skinner gone at the time you and Wilson went up to the hotel?

A. I don't know.

Q. Were you present while Mr. Skinner had any conversation with anybody in the office, before going up to the hotel?

A. I was there when he came in.

Q. What did Mr. Skinner say when he came in?

A. This one end of the banner was loose, and he wanted us to put it up again.

291 Q. What reply was made to that, if any?

A. We said we would go up and try to get hold of the end and pull it back up again.

Q. You say it was about half past one when you did that?

A. Right after dinner.

Q. Was Mr. Skinner up there while you were trying to do that?

A. On the roof?

Q. No, at the hotel.

A. I didn't see him after we started out.

Q. When you went up, did you get permission from anybody to go up on to the hotel?

A. No, sir.

Q. Who told you to go there?

A. Mr. Skinner.

Q. How did you get up on to the roof?

A. I couldn't say whether we walked up the stairs or went up in the elevator.

Q. Did Mr. Wilson go with you?

A. Yes, sir.

Q. After you couldn't get this up with the fishing pole, what did you do?

A. I went over to the Electric Company's office and reported to the assistant superintendent.

Q. Then what was done?

A. He told us to let it go, we didn't have to bother.

By Mr. Jones: I ask to have that answer stricken out.

By Mr. Miller:

Q. What did you do then?

A. We didn't bother with it.

Q. Did you afterwards go and get your father?

A. Yes, sir.

Q. Where was he?

A. Out at the glass plant.

Q. Then what did you do?

A. We came in and started to put the banner up again.

Q. Did you put the banner up?

A. Yes, sir.

Q. What did you use for supporting this banner, hanging it,—the same rope that had been used before, or a different rope?

A. —.

Q. What was this new rope that you had, what kind?

A. It was a 3/8 inch guy rope, galvanized guy wire.

Q. Was it a hemp rope or an iron rope?

A. Iron.

Q. Who assisted in putting that banner up at that time?

A. My father and I.

Q. Who else, if anybody—Mr. Wilson?

A. I don't remember Mr. Wilson; that is, when we put it around the chimney.

Q. Was Mr. Wilson there helping to hold the banner up or doing anything in reference to it?

A. That is when my father and I went up?

Q. Yes?

A. I don't remember.

Q. Or while you were there on the roof?

A. No, sir.

Q. Was your brother Terry there?

293 By Mr. Jones: Objected to as being leading and the witness already having stated he doesn't remember any other than his father and himself.

By the Court: His attention can be called to any particular person.

By Mr. Miller:

Q. Was your brother Terry there?

A. I don't remember of him being there.



Q. What did you do with reference to putting up this banner?  
Just go ahead and tell us what you did.

A. We put it around the chimney.

Q. Put what around the chimney?

A. Put this guy wire that we had stretched across the street,  
around the chimney and clamped it together.

Q. Did you draw the wire up tight?

A. Yes.

Q. How did you draw it up?

A. We had a pair of blocks.

Q. How did you fasten those blocks?

A. Fastened it to the guy that we had pulled across the street,  
took two loops around the chimney and clamped the other end on to  
the main rope.

Q. Was the rope drawn up tight?

A. Yes, sir.

Q. What did you do in reference to it, yourself?

A. As near as I can remember, I helped put the rope around the  
chimney, and helped clamp it.

Q. Where was that rope put around the chimney?

A. Down around the flashing.

294 Q. How many times was it wrapped around the chimney?

A. Twice.

Q. And then you clamped it?

A. Yes, sir.

Q. On to the main part of the rope?

A. Yes, sir.

Q. What did you use to clamp it with?

A. A three-bolt clamp.

Q. One or two of them?

A. One.

Q. Did you see where the first rope had cut off?

A. Yes, sir.

Q. Where had it cut off?

A. Right in the eye of this hinge that was bolted on to the  
building.

Q. Did you see Frank Sober on the roof that day?

A. I did not.

Q. Did you see any of his men on the roof?

A. No, sir.

Q. Did you have any conversation or hear him have any con-  
versation with any of your men there?

A. I did not.

Q. What day of the month was this?

A. They day we put it around the chimney?

Q. Yes?

A. On October 7th.

Q. Is there anything that fixes that in your mind?

A. Yes, sir.

Q. What is it?

A. The day our barn burned down.

— Where was your barn?

A. On Clark avenue, on the rear of the lot.

295 Q. Where were you at the time your barn burned?

A. Working at this banner.

Q. Was that your barn or your father's barn?

A. My father's barn.

Q. And that you say is the day you put it around the flue?

A. Yes.

Q. Was your father there with you at the time the barn burned?

A. Yes, sir.

Cross-examination.

By Mr. Jones:

Q. That was October 7th?

A. The day we put it around the chimney?

Q. Yes?

A. Yes, sir.

Q. Were you up there any other time after that?

A. I don't remember of being up, no, sir.

Q. Were you in Dubois the day of the accident?

A. The day the banner fell?

Q. The day the chimney was pulled down?

A. No, sir.

Q. And the best of your recollection is that you hadn't anything to do with it other than the day you helped fasten it about the chimney?

A. I did not.

Q. What kind of an order did you get from your office?

296 By Mr. Miller: Objected to, as he has not testified he got any order from the office.

By the Court: He has not stated he got an order.

By Mr. Jones:

Q. After Mr. Skinner told you that the banner was loose on that side and it should be fastened up, what did you do then? Did you report that to any one of your company?

A. I don't remember.

Q. You don't remember?

A. No.

Q. Where were you at that time?

A. When he reported it?

Q. To you, yes?

A. In the Electric Company's office.

Q. When had this banner come down?

A. I don't remember that.

Q. Did you see it down?

A. That is, when it came loose from the hinge?

Q. Yes?

- A. I seen it down when he told me about it——
- Q. Hadn't you seen it before he told you about it?
- A. I don't remember of seeing about it.
- Q. It was about 1:30 in the afternoon he told you about it?
- A. Yes, sir.
- Q. And you hadn't seen it down before that?
- A. No, sir; not that I remember.
- Q. How long had you been in the office?
- 297 A. I suppose about half an hour or so.
- A. And the banner was flying right outside of your office, was it not?
- A. Almost outside.
- Q. Right handy to your office?
- A. Yes, sir.
- Q. You could observe it as you would go in and out of your office? You could see the banner suspended across the street, couldn't you?
- A. Yes, sir.
- Q. And you hadn't noticed the banner down, its first fastening on the hinge—you hadn't noticed it down before Mr. Skinner called your attention to it at the office?
- A. Not that I remember.
- Q. Did you report that fact to any of your superiors, that the banner was down, after Mr. Skinner told you?
- A. Not that I remember of until I went up and tried to help them.
- Q. Did you go with Mr. Skinner at that time?
- A. I did.
- Q. To the roof of the hotel?
- A. Yes, sir.
- Q. And took a fishing rod with you?
- A. Yes.
- Q. In an effort to get the loose end back up on the roof.
- A. Yes, sir.
- Q. You were unable to do it?
- A. Yes, sir.
- Q. After Mr. Skinner called your attention to the fact that the banner was loose, where did you go?
- A. I don't know.
- Q. Did he remain at the office?
- 298 A. I couldn't say.
- Q. Did you see him again that day?
- A. I don't remember.
- Q. Did he say anything to you again about it that day?
- A. I don't remember that.
- Q. You remember that he came there and told you that the banner was loose, and should be put back?
- A. Yes, sir.
- Q. But you don't remember what he did then? You don't remember whether he remained at the office?
- A. I do not.
- Q. You don't remember whether you saw him again that day?
- A. I don't remember.

Q. You don't remember whether he said anything more to you about the banner that day?

A. No, sir.

Q. Did you make the fastening around the chimney that day?

A. Yes, sir.

Q. Do you remember saying anything more to him that day?

A. No, sir.

Q. And you have no recollection of seeing him again that day?

A. I don't remember.

Q. After you found you couldn't get it up with a fishing pole, it was too windy, you say you went for your father?

A. Yes, sir.

Q. Where was he.

299 A. At the glass plant, south of town.

Q. Did you find him there?

A. Yes, sir.

Q. Who sent you there for your father?

A. I don't remember who sent me.

Q. You had seen Mr. Blakesley?

A. Yes, sir.

Q. And then after you saw him, you went and got your father?

A. Yes, sir.

Q. And your father came back with you?

A. Yes, sir.

Q. And your father assisted in putting it up?

A. Yes, sir.

Q. Your father had charge of putting it up?

A. Yes, sir.

Q. That was the time you fastened it to the chimney?

A. Yes, sir.

Q. Do you remember how you drew it up, the cable?

A. Yes, sir.

Q. Did you hear your father's testimony here?

A. Part of it, yes, sir.

Q. Did you hear his testimony about drawing it up with blocks?

A. Yes, sir.

Q. Is that your testimony that that was the way it was drawn up?

A. We pulled it with blocks, yes, sir.

Q. And drew it tight?

A. Yes, sir.

Q. And you say it was fastened around the flashing?

300 A. Yes, sir.

Q. Did you ever see it after that day that you were there?

A. Not that I remember of.

Q. Did you make any effort to fasten it to the cleat the day you went up there?

A. Not that I remember.

Q. Before you fastened it to the chimney?

A. Not that I remember.

Q. Whose idea was it to fasten it to the chimney?

By Mr. Miller: I don't think that is material. It is objected to.

By the Court: I think it is not material.

By Mr. Jones:

Q. How old are you?

A. Twenty-eight.

Q. You are older than Terry by three years?

A. Almost three years, yes, sir.

Q. So at the time of the accident you would be twenty-three?

A. Yes, sir.

Q. You don't remember Terry being on the roof at the time you were there, do you?

A. I don't remember.

Q. And you say that the only time you were there was the time you fastened it to the chimney?

A. Yes, sir.

301 Q. That was not the first time that the banner was put up, was it?

A. No, sir.

Q. That was not the time that Terry went up to the roof and fastened it to the cleat?

A. No, sir.

Q. That had been before that, that is, Terry's going up and fastening it to the cleat had been sometime before your going up?

A. Yes.

Q. It wasn't the same day?

A. No, sir.

302

*H. B. Johnston—Recalled.*

H. B. JOHNSTON, recalled, testified as follows:

Direct examination.

By Mr. Miller:

Q. Do you remember the day that your barn burned?

A. Yes, sir.

Q. State whether or not that was the day that you were on the roof of the Commercial Hotel?

A. Yes, sir.

Q. Was that the day you put this cable around the flue on that hotel?

A. Yes, sir.

Q. After fastening this cable around the flue, state whether or not you made any report of your work to M. O. Skinner.

A. Yes, sir.

Q. When was that?

A. In the evening after supper, I think it was.

Q. Where did you see Mr. Skinner?

A. On Long avenue; West Long avenue.

Q. What did you tell him with reference to this work?

A. I told him where we had fastened, around the flashing, at the bottom of the flue.

Q. What did Mr. Skinner say, if anything?

A. He said if we put it around the bottom of the flue it was all right.

303 Cross-examination.

By Mr. Jones:

Q. How did you come to meet Mr. Skinner on Long avenue?

A. I was walking down Long avenue, and Mr. Skinner was going in the opposite direction.

Q. Who told you to see Mr. Skinner?

A. No one.

Q. Had Mr. Skinner ever talked to you about it before?

A. No, sir; not to my knowledge.

Q. Your son was the one that came to get you to go up on the roof the day you fastened it to the chimney?

A. Yes, sir.

Q. Where were you going at the time you met Mr. Skinner?

A. I don't remember. I was just walking on the street, I think.

Q. You were not going to see Mr. Skinner?

A. No, sir.

Q. You just happened to meet him on the street?

A. Yes, sir.

Q. Was it near where the banner was suspended?

A. Yes.

Q. And you told him the banner was fastened to the chimney?

A. Yes.

Q. You told him the banner had come down from the cleat, didn't you?

A. Not to my knowledge, I didn't.

304 Q. Didn't you tell him the banner had come down from the cleat and you had fastened it to the chimney?

A. I don't remember of telling him that.

Q. Wasn't that the first time Mr. Skinner knew there had been a change in the location, when you told him about it and asked him if it would be safe?

A. I don't know that, no, sir.

Q. You told Mr. Skinner that you had fastened it around the flashing of the chimney, didn't you?

A. Yes, sir.

Q. And you say that is where you had, in fact, fastened it?

A. Yes, sir.

Q. And you say that is where the fastening remained all the time the banner was there?

A. Yes, sir.

Q. And you asked Mr. Skinner if fastened there about the flashing, it would be safe, didn't you?

By Mr. Miller: We submit the witness did not so testify, and object to it.

A. I told Mr. Skinner we had put it around the flashing of the flue, and he said it was all right.

By Mr. Jones:

Q. Didn't you state to him that he was a practical man and you wanted to know whether that was all right there around the flashing of the flue, and didn't he state that if it was around the flashing of the flue it would be all right?

A. Yes, he did.

Q. And hadn't you said that to him when he said that to you?

A. I may have said something in the same words, I don't  
305 just remember.

Q. Did you tell him in the same conversation that you had furnished a wire cable to use in making the fastening to the chimney and that the Electric Company would take it back whenever they took the banner down?

A. I don't remember of saying that.

Q. You did furnish the cable? You have already testified to that.

A. The cable was brought over and used there, yes, sir.

Q. You testified that your son Vernon, and Mr. H. R. Wilson were the men that were with you on the roof?

A. Yes, sir.

Q. Do you remember of Terrence being there?

A. I don't remember, no.

Q. You don't remember of his being there at that time?

A. Not now, no.

Recess.

306

Afternoon Session.

*Testimony of Austin Blakesley.*

AUSTIN BLAKESLEY, a witness called on behalf of defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Where do you live?

A. Dubois.

Q. Where were you living in October of 1912?

A. Dubois.

Q. What was your connection at that time with the Dubois Electric Company?

A. I was president of the company.

Q. Are you president now?



A. No, sir.

Q. State whether or not you had a conversation with M. O. Skinner in the Monongahela Hotel, in the City of Pittsburgh, in December of 1915, as to what arrangement or contract he had with the Dubois Electric Company in reference to the suspension of this banner?

A. I did.

Q. What was that conversation?

A. I asked him why he said on the stand that his understanding was that the Dubois Electric Company was to take down the banner.

Q. What did he say in reply to that?

A. Well, he said, "I meant by that, that I intended to get your company to take the banner down".

Q. Did he state just what contract he had made with the company?

A. He said, of course, there was no agreement, or no arrangement of any kind, that our men were to take care of the banner, or to take it down.

Q. Did you have another conversation with Mr. Skinner on Saturday of last week?

A. Yes, sir.

Q. Where was that conversation?

A. It was on the sidewalk in front of my residence in Dubois.

Q. What did Mr. Skinner say at that time, with reference to his arrangement with the Dubois Electric Company?

A. He said there never was any arrangement or any agreement with our men to maintain or take down the banner.

Q. State whether Mr. Skinner or anybody else talked with you concerning the removal of this banner from the Commercial Hotel and the Deposit National Bank building, and its erection at the intersection of Brady street and Long avenue.

A. Yes, sir.

Q. Where did that conversation take place?

By Mr. Jones: Objected to as being irrelevant and immaterial. It was after the accident.

308 By Mr. Miller: It is for the purpose of contradiction of the witness, M. O. Skinner. who testified he had no conversation  
RE I recall it.

(Question withdrawn.)

Cross-examination.

By Mr. Jones:

— You were president of the Dubois Electric Light Company in 1912?

A. Yes.

Q. You were a stockholder in that company?

A. I was at that time.

Q. While you say "at that time," are you now a stockholder?

A. No, sir.

Q. Are you not now a director of the Dubois Electric Company?

A. Yes, sir.

Q. You are a director at the present time?

A. Yes, sir.

Q. Had you had any conversation with Mr. Skinner about the Electric Company's erection of the banner prior to the time the banner was put up?

A. No, sir.

Q. Did you have any conversation with Mr. Skinner about the erection of the banner, during the time the banner was suspended?

A. Do you mean before it came down?

309 Q. Before it pulled the chimney over?

A. No, sir.

Q. The first conversation you testified to about this banner with Mr. Skinner, was in December of 1915, over three years after the accident. Is that not correct?

A. You mean whether I ever had talked with him before that?

Q. No. The first conversation you have testified to here today was in December of 1915, more than three years after the accident?

A. That is the one I testified to, yes, sir.

Q. Is it not a requisite of the Dubois Electric Company that the directors should be stockholders?

A. They must have one share of stock in their name. I don't own any stock.

Q. You have stock in your name, though?

A. I understand there is one share of stock in my name, but it has been assigned to the company.

Q. And you are a director?

A. Yes, sir.

310

*Testimony of R. B. Blakesley.*

R. B. BLAKESLEY, a witness called on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Where do you live?

A. In Dubois.

Q. What is your connection with the Dubois Electric Company?

A. I am manager.

Q. Where were you living in October, 1912?

A. Dubois.

Q. What was your connection with the company at that time?

A. I was general superintendent.

Q. Did anybody interested in the erection of this banner, have any conversation with you prior to its first erection, concerning its erection?

A. Prior to its first erection?

Q. Yes?

A. No, sir.

Q. Were you at home at the time the banner was erected the first time?

A. No, sir.

Q. Were you at home when the banner was put up the second time?

A. No, sir.

311 Q. Were you at home on election day, when the banner was taken down?

A. Yes, sir.

Q. State whether or not any person or persons came to see you and requested you to have the banner taken down on election day.

A. On election day——

By Mr. Jones: State whether they did.

A. Yes.

By Mr. Miller:

Q. Who were those persons?

A. M. O. Skinner and John Hess.

Q. Who was John Hess?

A. He was the postmaster at Dubois at that time.

Q. What time of the day did they see you in reference to that?

A. It was about six o'clock, a little bit before. I had just left my office.

Q. In the evening?

A. In the evening.

Q. Where did they see you?

A. Right at the corner of Long avenue and Brady street, right in front of the Deposit National Bank entrance.

Q. Was it at the intersection of those streets that this banner was suspended at that time?

A. Yes.

312 Q. What was said to you about having the banner taken down?

A. They said they wanted the banner down; they had been to the office to ask to have it taken down, but they were afraid it would be neglected and they wanted it taken down that evening, and it was so late in the day that they were afraid it wouldn't be attended to, and they came to see me personally so that I would follow it up and get it down, before night.

Q. What reason was given for wanting it down at that time?

A. The statement was made that——

By Mr. Jones: Objected to as irrelevant and immaterial.

By the Court: That would be a part of the conversation, and we couldn't exclude it.

A. The reason that was given was that, "We don't want to have any more trouble with that banner"; likely somebody would pull it down and have a bonfire, and Mr. Hess said, "We want to get the damned thing out of sight."

By Mr. Miller:

Q. Was Mr. Skinner present when that remark was made?

A. He was.

Q. Had Mr. Skinner joined in the conversation with you?

A. I don't know that Mr. Skinner said very much. He stood with Mr. Hess and assented to it, but my recollection is that he didn't speak much. Mr. Hess was a positive speaker, and Skinner sort of hung back and let Hess do the talking.

313 Q. Did your company do anything in pursuance of that conversation?

A. Yes, sir.

Q. What did you do?

A. We took it down that evening.

Q. About what time was it taken down?

A. It was taken down some time before eight o'clock.

Q. Had you had any conversation with Mr. Skinner in reference to what the arrangement was with your company concerning the suspension of this banner?

A. Yes, sir.

Q. Can you tell when you had such a conversation?

A. I had one about six weeks ago.

Q. Where was that?

A. That was on North Brady street, or as we call it, the Boulevard—a small iron bridge about where a track turns off that goes down to the driving park in Dubois.

Q. Did Mr. Skinner say anything about what the original arrangement was between your company and him, with reference to this banner?

A. He did.

Q. What was that?

By Mr. Jones: What did Mr. Skinner say?

314 By Mr. Miller:

Q. Just the conversation.

A. Do you want all of the conversation?

Q. Yes.

A. I met Mr. Skinner as I was going from the power house, and he said, "Do you know that the Pancoast case is coming up again," and I said, "Why, I understand it is," and he said, "I wish we would get done with it," and I said, "Well, what are they going to do this time. "He—

By Mr. Jones: I object to any conversation except such as goes to contradict Mr. Skinner as to what he testified the arrangement was.

By Mr. Miller: This is all for the purpose of contradiction, because Mr. Skinner denied he had any conversation.

By the Court: It is only by way of contradiction of something material, as affecting the credibility of the witness.

By Mr. Miller: We will ask the witness to confine his testimony to what Mr. Skinner said with reference to the contract originally between the company and Mr. Skinner.

A. I said I would like to know exactly what the arrangement was when that banner was put up. Mr. Skinner said, "I'll tell you. I went up to your people, and I think it was Irvin, and asked them to put the banner up and take it down, and he said he wouldn't have anything to do with it. I went back later and asked them to put it up, and they sent some men with me to put it up." I said, "Is that what you will swear to?" He said, "I can't swear to anything else."

315 Q. Is that all the conversation at that time, relating to the putting up of the banner?

A. That was all the conversation, yes, sir.

Q. Did you have any subsequent talk with Mr. Skinner?

A. Yes, sir.

Q. When was that?

A. It was about a week ago.

Q. Where did that take place?

A. It took place in front of the Deposit National Bank building, about 10 or 15 feet west of the entrance to our office.

Q. Confining your testimony now to what the original arrangement was with your company, just state all Mr. Skinner said.

A. I asked Mr. Skinner again just what the arrangement was, and he repeated, or rather he said, "I went to Irvin and asked him to put the banner up and take it down, and he said he wouldn't have anything to do with it, and kind of turned his back on me, but I came back later and asked Coulson to put the banner up, and he sent some men with me to put it up."

Q. Was that all of the conversation you had at that time?

A. That was all relating to the banner.

Q. Was there any other time you had any conversation with Mr. Skinner concerning the erection of this banner, or did those two times cover it?

A. Concerning the erection of it?

Q. Yes.

A. Those two times are all that I had any conversation in regard to the banner, with him.

316 Cross-examination.

By Mr. Jones:

Q. You are manager of the Dubois Electric Company at the present time?

A. Yes, sir.

Q. How long have you been their manager?

A. I have had the title of manager since, I suppose it was the first of October.

Q. Of this last year?

A. Yes, last year.

Q. Are you a stockholder in the Dubois Electric Company?

A. No, sir.

Q. Do you have any connection with the Dubois Traction Company?

A. I am manager of the Dubois Traction Company.

Q. John Hess, of whom you spoke, is dead?

A. Yes, sir.

Q. How long has he been dead?

A. I think he has been dead for possibly three years. I know it was some time after President Wilson was inaugurated, but I couldn't give the exact date; two or three years, I should think.

Q. He was the one that did the talking to you on election night in Mr. Skinner's presence?

A. He did most of the talking.

Q. And that was election night?

A. Yes, sir.

Q. Is that correct?

A. Yes, sir.

317 Q. And that was several weeks after the chimney had pulled over was it?

A. Yes, sir.

Q. The banner remained up during the meanwhile, didn't it, from the time of the accident, when it was replaced?

A. This time it was not in the same place.

Q. It had been replaced at the poles?

A. Yes, sir.

Q. And you hadn't any conversation with Skinner with reference to the banner, prior to election evening, had you?

A. No, sir.

Q. That was the first you had?

A. Yes.

Q. So you had no conversation with Skinner prior to the time the banner pulled the chimney over, did you?

A. No.

Q. You were never present in the office when Skinner went there?

A. No, sir.

Q. To engage the services of your company?

A. No, sir.

Q. You were never present when Skinner was about there at any time to make an arrangement with your company respecting the erection and maintenance of the banner, were you?

A. No, sir.

Q. And all you know about what the arrangement was, was what you gained from Mr. Skinner six weeks, or a week ago; is that correct?

A. Well, that isn't all I know about it. I gained information from other sources.

318 Q. And when you had your conversation with Mr. Skinner six weeks ago, where was that?

A. It was on the Boulevard, as we call it.

Q. Near where the track turns off?

A. Yes.

Q. How did you happen to meet him there?

A. I was going from our power house to the office, and I was walking and met him going in the opposite direction.

Q. Who had Mr. Skinner seen at the office of the Electric Company when he made the arrangement?

A. What arrangement was that?

Q. Concerning the banner, before the accident.

By the Court: He only testified to a conversation. Better confine yourself as far as possible to the conversation.

By Mr. Jones:

Q. As I understand you, he hadn't seen you?

A. No, he hadn't.

Q. And you met him six weeks ago and said, "I would like to know exactly what that arrangement was"? You were interested in that arrangement, weren't you?

A. I certainly was.

Q. And that was the reason of your interrogating Skinner as to just exactly what that arrangement was?

A. Yes, sir.

By Mr. Miller: We object to this unless we are permitted to show another conversation.

319 By the Court: Within reasonable limits, we will allow it

By Mr. Jones:

Q. You were interested to find out exactly what the arrangement was, and that was what prompted your asking Skinner, wasn't it?

A. Yes.

Q. You wanted to know, and in order to know you ask Skinner?

A. Yes.

Q. You believed Mr. Skinner knew, didn't you?

A. I did.

Q. And Skinner said that he would tell you, and you listened to what he said the arrangement was, didn't you?

By Mr. Miller: We object to the form of the question.

By the Court:

Q. Did you listen?

A. Yes, sir.

By Mr. Jones:

Q. You asked him for information, and listened to it?

A. Yes.

Q. And you say that all he said was that he had gone there and



that Irvin said they wouldn't have anything to do with it, and then he had gone away and come back; wasn't that it?

A. No, sir.

Q. What was it?

320 A. I said he went to Irvin and told him they wanted him to put the banner up, and take it down, and Irvin said they wouldn't have anything to do with it, but he went back later and saw Coulson and asked him to put it up and Coulson sent two men with him to put the banner up.

Q. Then he didn't tell you what he had said to Coulson, did he?

A. Yes, he said he asked Coulson to put the banner up.

Q. Is that all he asked Coulson?

A. That is what he told me.

Q. He had asked Irvin to put it up and take it down, and when he went back he merely asked Coulson to put it up?

A. Yes, sir.

Q. Then when you found that out in your interest to learn exactly what the arrangement was, your same interested prompted you only a week ago to again go to him and ask him just exactly what the arrangement was?

A. I did not go to him either time.

Q. When you met him at the Deposit National Bank only a week ago, even though he had explained this arrangement as you say he did, you again asked him, "I want to know just exactly what the arrangement was," didn't you?

A. After considerable conversation on another matter, I did.

Q. You were considerably interested in exactly what that arrangement was?

A. I was.

Q. You are still interested in exactly what that arrangement was?

A. Yes, sir.

321 Redirect examination.

By Mr. Miller:

Q. Did you go to him at all for the first conversation?

A. I did not.

Q. Did you go to him for the second conversation?

A. I did not.

Q. And did you have other conversations leading up to what you talked about the banner?

A. I did.

322

*Testimony of J. N. Griesener.*

J. N. GRIESENER, a witness called on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Where do you live?

A. Dubois.

Q. How long have you lived there?

A. About twenty-four years.

Q. What official position do you hold in the city government of Dubois?

A. I am one of the members of council there.

Q. What form of government do you have?

A. We have a third class city.

Q. Your council is composed of how many members?

A. Four members and the mayor.

Q. Do you know M. O. Skinner?

A. Yes.

Q. How long have you known him?

A. About twelve or fifteen years.

Q. Do you know what his general reputation in that community is for truth and veracity?

A. Yes, sir.

323 By Mr. Jones: The preliminary ground for the question has not been laid in that a knowledge of the reputation of Mr. Skinner generally, is not known to this witness.

By the Court: If he knows Mr. Skinner's general reputation.

(Question read.)

A. Yes, sir.

By Mr. Miller:

Q. What is that reputation—good or bad?

A. Bad.

Cross-examination.

By Mr. Jones:

Q. You are a member of council?

A. Yes.

Q. And a resident of Dubois.

A. Yes, sir.

Q. And Mr. Skinner is a fellow-citizen of yours?

A. Yes.

Q. A fellow-townsmen?

A. Yes, sir.

Q. Do you know Mr. Skinner?

A. I believe I do.

Q. Do you know the people with whom he associates?

324 A. Pretty well, yes, sir.

Q. You are a member of council?

A. Yes, sir.

Q. An elective position?

A. Yes, sir.

Q. You are in politics, are you not?

A. I suppose you would call it politics.

Q. You are a candidate for an appointive office in this state at the present time, are you not?

A. No, I am not.

By Mr. Miller: Objected to as being immaterial and irrelevant.

By the Court: Objection sustained.

By Mr. Jones:

Q. Haven't you an animus against Mr. Skinner on account of what you suppose to have been by him his use of his influence to have another man appointed to an office for which you were a candidate?

A. No, sir.

Q. You haven't any such animus?

A. No, sir.

Q. And just on your general knowledge of Mr. Skinner, from associating with him in town, seeing him in town, being a fellow-citizen of the town, you are willing to come here and testify that his reputation for truth and veracity is not good?

325 By Mr. Miller: Objected to.

By the Court: Objection sustain.

Q. You are willing to so testify from the knowledge you have?

By Mr. Miller: Objected to because his presence here shows his willingness.

By the Court: Most of this argumentative. He has already so testified.

By Mr. Jones: From the knowledge he has, I am asking.

By Mr. Miller: Objected to as not being proper cross-examination.

By the Court: Objection sustained.

(Question withdrawn.)

*Testimony of A. L. Steffy.*

A. L. STEFFY, a witness called on behalf of the defendant, having been duly sworn, testified as follows:

## Direct examination.

By Mr. Miller:

- Q. Where do you live?  
A. Dubois, Pennsylvania.  
Q. How long have you lived there?  
A. Sixteen years.  
Q. What is your business?  
A. Drayman.  
Q. Do you run motor truck drays?  
A. I have teams and motor trucks.  
Q. Do you know M. O. Skinner, of Dubois?  
A. Yes, sir.  
Q. How long have you known Mr. Skinner?  
A. Ever since I have been in Dubois.  
Q. Do you know what his reputation in that community is for truth and veracity?  
A. Not very good.  
Q. Just answer the question whether you know it or not.  
A. Yes, I do.  
Q. What is that reputation?  
A. Not good.

## 327 Cross-examination.

By Mr. Jones:

- Q. You said it was not very good at first. What distinction do you draw? You wouldn't want to say that Mr. Skinner was unworthy of belief at all times, would you?  
A. I wouldn't like to say that.  
Q. And wouldn't your question as to his credibility arise more where there was a personal interest in it?

By Mr. Miller: Objected to as not a proper question.

By the Court: The examination should bear on the question of his knowledge as to his general reputation, and what that knowledge is; what his knowledge is on that subject.

By Mr. Jones:

- Q. How long have you lived in Dubois?  
A. Sixteen years.  
Q. Where did you come from to Dubois?  
A. Indiana county; McKean Center, is the postoffice.  
Q. You are a drayman?  
A. Yes.

Q. You do general hauling?

A. Yes, sir.

328 Q. For any person about the town that gives you the employment?

A. Yes, sir.

Q. Are you employed by the Dubois Electric Company at any time?

A. Sometimes.

Q. You do hauling for them?

A. Yes, sir.

Q. Deesn't Mr. Skinner owe you some money?

By Mr. Miller: Objected to as immaterial.

By the Court: Objection sustained.

By Mr. Jones:

Q. You wouldn't say you would consider him unworthy of belief at all times?

By Mr. Miller: Objected to as immaterial and irrelevant.

By the Court: I think that is not the inquiry. This is the only kind of hearsay testimony that is admitted; that is, not what the witness may personally know or even what he may personally think but what the people generally say, is the one and only kind of hearsay testimony that is admissible.

329

*Testimony of James Hall.*

JAMES A. HALL, a witness called on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Where do you live?

A. Dubois.

Q. How long have you lived there?

A. Twenty-eight years.

Q. What is your business?

A. Coal business.

Q. Do you know M. O. Skinner?

A. Yes, sir.

Q. He lives in Dubois?

A. Yes, sir.

Q. How long have you known him?

A. I don't exactly know. I judge it is seventeen or eighteen years.

Q. Do you know what Mr. Skinner's general reputation in that community is for truth and veracity?

A. Yes, sir.

Q. What is it?

A. Bad.

330 Cross-examination.

By Mr. Jones:

Q. You are in the coal business?

A. Yes, sir.

Q. And a resident of Dubois?

A. Yes, sir.

Q. Do you know the people with whom Mr. Skinner associates?

A. Yes, sir.

Q. Have you associated with him?

A. Not lately.

Q. You had some business dealings with him?

A. No, not lately I didn't have any business dealings.

By Mr. Miller: Objected to as immaterial.

By the Court: Objection sustained. It would not be material unless it would possibly bear on the question of animus, unless it was shown that he had some enmity to this man; but his business association is not material.

By Mr. Jones:

Q. Don't you have an animus against Mr. Skinner by reason of the fact that you had a dispute with him over an account which you claimed Mr. Skinner misstated some fact?

A. I have nothing against Mr. Skinner at all.

Q. Didn't you have such a dispute?

331 By Mr. Miller: Objected to.

By the Court: Objection sustained.

Q. You say you have no animus against him on account of any such dispute?

By Mr. Miller: That is objected to in the form it is put.

By Mr. Jones:

Q. Do you bear him any ill will on account of a dispute?

A. No.

By Mr. Miller: Objected to.

Q. But you will testify that his reputation for truth and veracity is not good?

A. That is the public opinion.

Q. Other than that, you bear him no ill will?

By Mr. Miller: Objected to.

By the Court: Objection sustained.

332

*Testimony of W. F. Weber.*

W. F. WEBER, a witness called on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Where do you live?

A. Dubois.

Q. How long have you lived there?

A. About five years.

Q. Does Mr. Skinner live in Dubois?

A. Ever since I have been there, yes, sir.

Q. How long have you known Mr. Skinner?

A. Five years.

Q. Did you know him prior to moving to Dubois?

A. I knew who he was, but I had no acquaintance with him.

Q. Do you know what Mr. Skinner's general reputation in that community is for truth and veracity?

A. Yes, sir.

Q. What is it?

A. Bad.

333 Cross-examination.

By Mr. Jones:

Q. What is your business?

A. I have been a merchant up to within a few weeks.

Q. Aren't you unfriendly to Mr. Skinner?

A. Never.

Q. You are not?

A. No, sir.

Q. Are you on good terms with Mr. Skinner at the present time?

A. So far as I know.

334

*Testimony of Thomas T. Kearns.*

THOMAS T. KEARNS, a witness called on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Where do you live?

A. Dubois, Pa.

Q. How long have you lived there?

A. About twenty years.



Q. What is your business?

A. I am a coal operator, contracting.

Q. Do you know M. O. Skinner?

A. Yes, sir.

Q. How long have you known him?

A. As long as I can remember. Living in Dubois, I know of him.

Q. Do you know what his general reputation in that community is for truth and veracity?

A. Yes, sir; I do.

Q. What is it?

A. Bad.

335 Cross-examination.

By Mr. Jones:

Q. You are a contractor?

A. Yes, sir.

Q. Mr. Skinner is a contractor?

A. He has not been for—I guess he is.

Q. Do you do any contract work for the Dubois Electric Company?

A. I have.

Q. You are not unfriendly with Mr. Skinner?

A. Not at all.

Q. You know him?

A. Yes.

Q. You are not unfriendly to him?

A. Oh, no.

336 *Testimony of William Wingert.*

WILLIAM WINGERT, a witness called on behalf of the defendant, has been duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Where do you live?

A. Lowensburg. (?)

Q. How far is that from Dubois?

A. About six miles.

Q. What is your business?

A. My business has been lumbering, the principal part of it, and farming.

Q. Are you well acquainted in Dubois?

A. Yes, sir.

Q. State whether or not you are frequently in Dubois.

A. Yes, sir; as high as sometimes two times and sometimes three times a week, and sometimes only once.

Q. Are you one of the large real estate owners there?

A. I think so.

Q. Are you well acquainted with the people of the city of Dubois?

A. Yes, sir.

337 Q. Do you know M. O. Skinner?

A. I sure do.

Q. How long have you known him?

A. Well, I couldn't exactly tell that. All the way from twelve to fifteen years, or longer.

Q. Do you know what his general reputation in that community is for truth and veracity?

A. Yes, sir.

Q. What is it?

A. Bad.

Cross-examination.

By Mr. Jones:

Q. You are not unfriendly to Mr. Skinner?

A. No.

Q. You are on good terms with him?

A. I am, yes, sir.

Q. Didn't you have a dispute with him over some work that he had done for you and for which you refused to pay him the commission due him?

By Mr. Miller: Objected to as immaterial and irrelevant.

By the Court: Unless there is some hostilities that would affect his testimony, you cannot inquire as to disputes, or who was right or wrong. You can inquire whether he was on bad terms with him.

338 By Mr. Jones:

Q. How long have you known Mr. Skinner?

A. I say, as near as I can tell, from twelve to fifteen years.

Q. How long have you known him well?

A. That is about the length of time I could tell you.

Q. And didn't he do some work for you in the last couple of years?

By Mr. Miller: That is objected to as immaterial.

By the Court: Objection sustained.

By Mr. Jones:

Q. Do you understand that you are testifying to Mr. Skinner's general reputation in the community?

A. Yes, sir.

Q. You so state?

A. Yes, sir.

339

*Testimony of S. W. Munro.*

S. W. MUNRO, a witness called on behalf of the defendant, having been duly sworn, testified as follows:

## Direct examination.

By Mr. Miller:

Q. Where do you live?

A. Dubois.

Q. How long have you lived there?

A. Twenty-three years.

Q. What is your business?

A. Gardiner and general contractor.

Q. Are you well acquainted in that community?

A. Yes, sir.

Q. Do you know M. O. Skinner?

A. Yes, sir.

Q. How long have you known him?

A. Fifteen years.

Q. Do you know what his general reputation in that community is for truth and veracity?

A. Yes.

Q. What is it?

A. Bad.

340 Cross-examination.

By Mr. Jones:

Q. You are a general contractor?

A. Yes, sir.

Q. You do contracting work for the Dubois Electric Company?

A. Never.

Q. You never did?

A. No, sir.

Q. You were a member of the Dubois Construction Company?

A. Yes, sir.

Q. Did they do work for the Dubois Electric Company?

A. No, sir.

Q. Mr. Skinner was a member of the Dubois Construction Company?

A. Yes, sir.

By Mr. Miller: Objected to.

By the Court: Objection sustained.

Q. Aren't you unfriendly to Mr. Skinner?

A. No, sir.

Q. Weren't you in partnership with Mr. Skinner?

By Mr. Miller: Objected to as immaterial.

By the Court: That question may be asked, as it might  
341 bear on his knowledge.

A. Yes, sir.

By Mr. Miller:

Q. When was it that you were in partnership with Mr. Skinner?

A. In 1915, I believe.

342 *Testimony of Alfred Johnston.*

ALFRED JOHNSTON, a witness called on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Where do you live?

A. Dubois.

Q. How long have you lived there?

A. Between thirteen and fourteen yeears.

Q. Are you well acquainted there in Dubois?

A. Yes, sir.

Q. Do you know M. O. Skinner?

A. Yes, sir.

Q. How long have you known him?

A. Thirteen years.

Q. Do you know his general reputation in that community for  
truth and veracity?

A. Yes, sir. At present very bad.

Q. You know, do you?

A. Yes.

Q. What is that reputation?

A. Bad.

343 Cross-examination.

By Mr. Jones:

Q. It is your opinion that his general reputation is bad?

A. Yes, sir.

By Mr. Miller: Objected to as not being a proper question.

By the Court: Objection sustained.

By Mr. Jones:

Q. You are not unfriendly to Mr. Skinner?

A. No. For the first eight years I was a good friend to him,  
but the last five years we are not friends because he don't talk the

truth, and don't pay his bills. We have been unfriendly that way. My opinion is he has a very bad reputation.

By Mr. Miller:

Q. What business are you in?

A. Masonary work.

Q. You are a stone mason?

A. Yes, sir.

344

*Testimony of W. H. Albert.*

W. H. ALBERT, a witness called on behalf of the defendant, having been duly sworn, testified as follows:

Direct examination.

By Mr. Miller:

Q. Where do you live?

A. Dubois.

Q. How long have you lived there?

A. About twenty-five years.

Q. Are you well acquainted in that community?

A. Yes, sir.

Q. What is your business?

A. Real estate.

Q. Are you a United States juryman this week?

A. Yes, sir.

Q. Do you know M. O. Skinner?

A. Yes, sir.

Q. How long have you known him?

A. About fifteen years.

Q. Do you know what his general reputation is in that community for truth and veracity?

A. I have heard a great deal of it.

Q. Then you do know what his general reputation is?

345

By Mr. Jones: Objected to as drawing a conclusion not justified by the witness's testimony.

By Mr. Miller:

Q. Do you know what his general reputation is?

A. It is not very good.

By Mr. Jones: Do you know his general reputation, is the question asked.

By the Court: Before you answer what his reputation is, you first have to state whether you know what his general reputation is. That means, do you know what the people in the community gen-

erally say about him, as to truth and veracity. That is the first question.

A. I will say not very good.

By Mr. Miller:

Q. What do you mean by "not very good,"—his reputation not very good?

A. Yes.

Cross-examination.

By Mr. Jones:

Q. His reputation for truth and veracity, you say, is not very good?

A. From what I hear.

346 Q. That is because you have heard certain specific things about him.

By Mr. Miller: Objected to as immaterial.

By the Court: Of course, they have a right to cross examine as to the extent of his knowledge, what has been said and so on, to determine the correctness of his statement that he knows his general reputation.

By Mr. Jones:

Q. How general is that reputation, in your mind?

A. You hear it quite often.

Q. At times you hear his veracity questioned; is that it?

A. From the different conversations you hear from the people that are interested in him. I have never had any dealings with him.

Q. You have known him for a long time?

A. Yes, sir.

Defendant rests in chief.

347

REBUTTAL.

*Testimony of Reverend J. V. Bell.*

Reverend J. V. BELL, a witness called on behalf of the plaintiff, having been duly affirmed, testified as follows:

Direct examination.

By Mr. Jones:

Q. You are a resident of Dubois, I believe?

A. Yes, sir.

Q. How long have you lived in Dubois?

A. Thirty-three years.

- Q. Are you a minister of the gospel?  
A. I am.  
Q. Of what church are you a minister?  
A. Pastor of the First Presbyterian church.  
Q. Are you located in Dubois?  
A. In Dubois.  
Q. How long have you been pastor of the First Presbyterian church in Dubois?  
A. Thirty-three years.  
Q. You are pastor there at the present time?  
A. I am.  
Q. Do you know M. O. Skinner?  
A. I do.  
348 Q. Do you know the people with whom he associates in Dubois?  
A. I do.  
Q. Do you know M. O. Skinner's general reputation for truth and veracity?  
A. I do.  
Q. Is it good or bad?  
A. Good.

Cross-examination.

By Mr. Miller:

- Q. With what people does Mr. Skinner associate?  
A. Quite generally with people in Dubois.  
side. Q. He associates with these men who were called here on the other side.  
A. I presume so.  
Q. He attends your church?  
A. Yes, sir.  
Q. You are his spiritual adviser?  
A. I am his pastor.  
Q. That is the same thing, isn't it?  
A. You can interpret it.  
Q. Haven't you heard his reputation discussed by members of your church?  
A. No, sir.  
Q. Haven't you heard them say that his reputation was bad?  
A. No, sir.

349 By Mr. Jones: I object to any further cross-examination of this sort, as not being a question of general reputation.

By the Court: This general line of examination is competent as bearing on the question as to his knowledge of his reputation, from having heard it discussed.

By Mr. Miller:

- Q. Haven't you heard your own members discussing it?  
A. No, sir.



By Mr. Jones: Objected to as not proper cross-examination.  
(Objection withdrawn.)

By Mr. Miller:

Q. And haven't you heard Mr. Skinner refer to it himself, by saying, "You know what the people say about me here?"

By Mr. Jones: Objected to. That is entirely improper.

By the Court: Objection sustained.

350

*Testimony of L. M. Simons.*

L. M. SIMONS, a witness called in rebuttal on behalf of plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. You are a resident of Dubois?

A. Yes, sir.

Q. How long have you lived in Dubois?

A. A little over six years.

Q. What is your business?

A. Agent for the United Natural Gas Company.

Q. Do you know M. O. Skinner?

A. Yes.

Q. Do you know his general reputation in Dubois for truth and veracity?

A. That is a pretty broad question. I don't know whether I can say I know it. I have heard it discussed both ways. I believe it to be all right.

By Mr. Miller: We ask to have that last answer stricken out.

By the Court: That is a question not of your personal belief, or your personal dealings, but a question of what the people  
351 generally say, with reference to the truth and veracity of Mr. Skinner, so the first question is, Do you know, are you in a position to have knowledge as to what that general reputation is. If you have, that makes you competent to testify; if you don't know, then you would not be competent.

A. I don't think that I have knowledge to answer that question.

By Mr. Jones:

Q. Your knowledge was specific that you were speaking of?

A. Yes, sir.

(No cross-examination.)

*Testimony of W. H. Watt.*

W. H. WATT, a witness called in rebuttal on behalf of plaintiff, having been duly affirmed, testified as follows:

Direct examination.

By Mr. Jones:

Q. Where do you live?

A. Dubois.

Q. How long have you lived there?

A. Thirty-five years.

Q. What is your business?

A. Bookkeeper; paymaster.

Q. For what company?

A. John E. Dubois.

Q. The man for whom the town was named?

A. Yes. That was his uncle.

Q. Do you know M. O. Skinner?

A. I do.

Q. Do you know his general reputation for truth and veracity?

A. Yes.

Q. Is it good or bad?

A. Good.

Cross-examination.

By Mr. Miller:

Q. Have you ever heard his reputation discussed in that community?

A. Well, not to any great extent.

Q. That isn't the question. Have you heard his reputation discussed in that community?

A. Might be one or two instances. His general reputation for truth, so far as my knowledge goes, is good.

Q. You have heard it discussed?

A. I have, yes.

Q. And haven't you heard it said that his reputation for truth and veracity was not good?

A. No.

Q. What was this discussion you heard about him?

A. It was more connected with political matters, I think.

Q. But the discussion about his reputation for truth and veracity?

A. I can't recall now what the discussion was on that.

Q. Haven't you heard it discussed at the Y. M. C. A., with which you are connected?

A. No, sir.

Q. Haven't you stated that you heard it discussed there?

A. No.

Q. And you say you never did hear it discussed?

- A. No, I didn't hear it discussed there.
- 354 Q. Where did you hear it discussed?
- A. I couldn't say.
- Q. You have heard it discussed, haven't you?
- A. I have heard some people make remarks about Mr. Skinner.
- Q. Haven't you heard a good many people say that?
- A. No, I have not.
- Q. And you can't tell now where you heard this discussion?
- A. No, I can't.
- Q. He has been the subject of discussion, hasn't he?
- A. A good while ago, probably.
- Q. He has been the subject of discussion?
- A. Well, I have heard mention made of him, somebody that wanted to say something about him.
- Q. You attend the First Presbyterian church, do you?
- A. Yes.

By Mr. Jones:

- Q. Do you hold any office in the First Presbyterian church?
- A. I belong to the Session.
- Q. You have lived in Dubois for thirty-five years?
- A. Yes.

355

*Testimony of H. J. Dormire.*

H. J. DORMIRE, a witness called in rebuttal on behalf of plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

- Q. You are a resident of Dubois?
- A. Yes, sir.
- Q. How long have you lived there?
- A. About twelve years.
- Q. Do you know M. O. Skinner?
- A. Yes, sir.
- Q. Do you know the people with whom M. O. Skinner associates?
- A. Not particularly. I don't pay strong attention.
- Q. I mean you are acquainted with the people in that town generally?
- A. Yes.
- Q. Do you know his general reputation for truth and veracity?
- A. It is good, as far as I know.

By Mr. Miller: That is not the question. I asked to have that stricken out.

A. I would say it was good.

356 By Mr. Jones:

Q. Say whether you know, first.

A. I could say yes.

Q. And is it good or bad?

A. Good.

Cross-examination.

By Mr. Miller:

Q. What business are you engaged in?

A. In the grocery business at the present time.

Q. Do you associate with Mr. Skinner.

A. Some.

Q. Do you associate with other people with whom he associates?

A. No, I couldn't say that I do in particular.

Q. What are your relations with Mr. Skinner, and how do you associate with him?

A. Nothing in particular, only just in business matters. He buys goods from us, and that is about the only way. He has done some work for us.

Q. He is a customer at your store?

A. Yes.

Q. And that is the extent of your association with him?

A. Of course, we are friendly to each other, and we meet and talk about business. We don't run around or discuss other people's business, or anything like that.

Q. And you don't associate in his company with the other people there are in Dubois?

357 By Mr. Jones: Objected to as not proper cross-examination.

By the Court: Does he know the people with whom Mr. Skinner associates, is probably the question.

(Question read.)

By Mr. Miller:

Q. What do you say to that?

A. To a certain extent.

Q. Where do you associate with him?

A. As I said before, we don't go together out in company, very much, only meeting each other on the street.

Q. That is, you and Mr. Skinner meeting each other.

A. Yes, while he comes in the store.

Q. Have you had any occasion to discuss his reputation with anybody?

A. Never.

Q. And you never heard what people say in Dubois about him?

By Mr. Jones: Objected to. I object to the counsel drawing a conclusion for the witness.

By the Court: That I understood to be in the form of question.

358 By Mr. Miller:

Q. Then you never heard the people discuss him in Dubois?

A. As I said before, I never did.

359

*Testimony of Claude Miles.*

CLAUDE MILES, a witness called in rebuttal on behalf of plaintiff, having been duly sworn, testified as follows:

Direct examination.

By Mr. Jones:

Q. Where do you reside?

A. Dubois, Pa.

Q. What is your occupation?

A. Manager of a wholesale fruit and produce house.

Q. How long have you lived in Dubois?

A. A little over ten years.

Q. Do you know M. O. Skinner?

A. Yes.

Q. Do you know his general reputation in the community for truth and veracity?

A. I think so.

Q. Is it good or bad?

A. I would consider it good for a politician. The reason I said that, I have a couple of uncles who are politicians, and people on the outside condemn them, but I consider them both fine men.

By Mr. Miller: I object to that and ask it be stricken out.  
360 By the Court: That would have to be stricken out.

Cross-examination.

By Mr. Miller:

Q. For whom do you work in Dubois?

A. Myself.

Q. Where is your business located?

A. In Dubois.

Q. Where in Dubois?

A. It is right, say within two squares of the postoffice.

Q. You spend your time at your place of business?

A. Principally so, yes.

Q. Have you discussed Mr. Skinner's reputation for truth and veracity in that community?

A. I don't know as I have.

Q. You have never taken that subject up with anybody there, have you?

A. No, sir.

Q. Do you go out with Mr. Skinner, around the city of Dubois, and meet the other people of Dubois?

A. I have been out with him at times, yes.

Q. Where?

A. In the city of Dubois.

Q. Where in the city of Dubois?

A. At church, and on the streets.

Q. You belong to this same Presbyterian church, do you?

A. I do.

Q. Skinner attends that church?

A. Yes, sir.

*Testimony of Frank Sober.*

FRANK SOBER, recalled in rebuttal, testified as follows:

Direct examination.

By Mr. Jones:

Q. You testified in this before?

A. I have.

Q. How long have you lived in Dubois?

A. About thirty-two years.

Q. You are a carpenter, I believe?

A. I am.

Q. How long have you been working in that trade?

A. In the neighborhood of thirteen or fourteen years.

Q. About Dubois?

A. About Dubois.

Q. And you are still working about Dubois?

A. Yes, in the neighborhood of Dubois.

Q. Do you know M. O. Skinner?

A. I do.

Q. How long have you known M. O. Skinner?

A. Oh, I would say, ten years at least.

Q. Do you know his general reputation for truth and veracity?

A. I do.

Q. Is it good or bad?

A. It is good.

Cross-examination.

By Mr. Miller:

Q. Have you ever discussed it with anybody?

A. Never, any more than in relation to politics.

Q. Does he have a reputation for truth and veracity up there in Dubois in politics, or in any other way?

A. I never heard of a politician that did have.

Q. Have you heard his reputation for truth and veracity questioned?

A. Pro and con.

Q. Then the people of that vicinity do discuss his reputation for truth and veracity?

A. Like everybody else.

Q. Just answer my question. Do you hear his reputation for truth and veracity discussed in that community?

A. I said pro and con.

364

*Testimony of Charles Hammer.*

CHARLES HAMMER, recalled in rebuttal, testified as follows:

Direct examination.

By Mr. Jones:

Q. You have testified you were a clerk at the Commercial Hotel

A. Yes.

Q. You were there the day of the accident to Mr. Pancoast?

A. Yes, sir.

Q. Were you there at the time Mr. Pancoast was brought into the hotel?

A. I was, yes sir.

Q. Did you see Mr. Pancoast when he was brought into the hotel?

A. Yes, sir; I did.

Q. Did you see Mr. Pancoast as he was carried up the stairs?

By Mr. Miller: Objected to as not rebuttal.

By the Court: I suppose it is leading up to Johnston's denial?

365 By Mr. Jones:

A. Yes, sir.

By the Court: This would not be material except as fixing a fact.

By Mr. Jones:

Q. Did you see Terry Johnston about the hotel there immediately after the accident to Mr. Pancoast?

By Mr. Miller: Do you mean Terry Johnston

By Mr. Jones: T. W. Johnston?

By Mr. Miller: I have no recollection that it was Terry who was asked that question.

A. I see him shortly after the accident.

By Mr. Jones:

Q. How shortly after the accident?

A. I couldn't say just how long after it was.



Q. Where was he when you saw him?

A. On the stairway coming down stairs.

Q. What were they doing with Mr. Pancoast at the time?

A. They were just taking him up in the elevator at the time.

Q. Were you going up the stairs at the time?

A. I was walking up stairs, yes, sir.

286 Q. And you passed Terry Johnston on the stairs?

By Mr. Miller: Objected to as leading and suggestive.

By Mr. Jones:

Q. Where was he coming from when you passed him?

A. I don't know. He was going down stairs.

Q. Going down stairs in the hotel?

A. Yes.

Q. About how long after the chimney fell over was it that Mr. Pancoast was taken up in the elevator; about how long?

A. I couldn't state exactly, because—— It may have been twenty minutes or half an hour.

Cross-examination.

By Mr. Miller:

Q. After Mr. Pancoast was injured was he carried into the office at the hotel?

A. Yes.

Q. And didn't he lie there for some time before he was taken up stairs?

A. Yes, sir.

Q. And wasn't medical aid summoned and rendered to him while he was down in the office?

A. Yes, sir.

287 Q. And what doctor was sent for?

A. To the best of my recollection, the first doctor was Dr. Fugate.

Q. Did he come?

A. Yes.

Q. Then who was the next doctor sent for?

A. I can't state positively, but I think Dr. Sullivan.

Q. Did Dr. Sullivan come?

A. He didn't come immediately.

Q. But he did come there finally, didn't he?

A. Yes, sir.

Q. And he came there while Mr. Pancoast was still down in the office?

A. I think so.

Q. And did Dr. Fugate and Dr. Sullivan both render aid to Mr. Pancoast down in the office before he was taken up stairs?

A. I can't say that Dr. Fugate rendered any aid. He looked him over.

Q. But Dr. Sullivan did?

A. I think he did.

Q. And didn't the brother of Mr. Pancoast before the doctors came, have Mr. Pancoast there for some considerable time himself, with some other people, rendering preliminary aid?

A. Well, his brother came in with him.

Q. It was some time before Dr. Fugate came, wasn't it?

A. Not very long.

Q. You had to send to Dr. Fugate's office?

A. I don't recall whether I sent for him—

Q. And Dr. Fugate wasn't at his office, was he, and didn't you have to send some other place for him?

A. I couldn't say positively; I don't remember.

368 Q. And then after Dr. Fugate came you sent for Dr. Sullivan?

A. Yes, sir.

Q. And you waited for Dr. Sullivan to come?

A. Yes, sir.

Q. And it was after Dr. Sullivan came and rendered aid, that he was taken up stairs in the elevator?

A. As I remember it, yes sir.

Q. When Mr. Pancoast was first taken into the hotel, he was unconscious, wasn't he?

A. I couldn't say positively.

Q. You are not clear upon what the facts were that day, are you?

A. Not the details, no, sir. It is five years ago.

Q. You were right there, weren't you?

A. Yes, sir.

Q. And you were the clerk at the hotel?

A. Yes.

Q. You were in charge of the hotel that day?

A. Yes.

Q. Mr. Bensinger was away, and you were interesting yourself about Mr. Pancoast's welfare, weren't you?

A. Yes, sir.

Q. And you were ordering the doctor summoned, weren't you?

A. Yes, sir.

Q. And you had charge of Mr. Pancoast and what was being done there, hadn't you?

A. No, not entirely.

Q. But you were in charge there

A. I was doing what I could.

369 Q. And yet you can't remember anything that happened in detail, can you?

A. I can't remember everything that happened, no, sir.

Q. Mr. Pancoast had regained consciousness before he was taken up stairs, hadn't he?

A. I don't know about that.

Q. You don't know anything about that?

A. No, sir.

Q. What you do remember is that you saw Terry Johnston on the steps of the hotel?

A. Yes, sir.

Q. And that was after the accident?

A. Yes, sir.

Q. At that time you were taking Mr. Pancoast up stairs?

A. At that time they were taking him in the elevator, yes, sir.

Q. You are clear as to that?

A. Yes, sir.

Q. Is there anything else that happened just at that time that you are clear about?

A. I don't know just what you mean.

Q. You said you don't remember anything else in detail; is that correct?

A. I said I didn't remember all the details.

Q. And you have given here just as much in detail of what happened as you can, have you?

A. Yes, sir.

Q. Wasn't it Mr. Crawford you met on the steps?

A. No, sir.

Q. Didn't the man you met on the steps have the uniform of a motorman on?

A. No, sir.

370 Q. Wasn't there a car of the United Traction Company standing out there on the Dubois Traction Company's track.

A. I couldn't say.

Q. You don't know that?

A. No, sir.

Q. Don't you know that a car was held there by reason of this banner having fallen across the trolley line?

A. I couldn't say that; no, sir. I was busy inside.

Q. Did you see Mr. Crawford there at all?

A. I don't recollect.

Q. Might it not have been Mr. Crawford you saw coming down there?

A. No, sir.

Q. You are sure of that?

A. Yes sir.

Q. Did you see Mr. Crawford about there?

A. I don't remember.

Q. Do you know Mr. Crawford?

A. I don't know him by name, no, sir. I might know him by sight.

Q. Now you have no recollection of knowing him at all. Is that right?

A. I may know him by sight, but I don't know which Mr. Crawford it is.

Q. Are you able to say now whether you know him by sight or not?

A. No, sir; I am not.

371 Redirect examination.

By Mr. Jones:

Q. You are sure of the day you saw Terry Johnston come down the stairs, are you?

A. Yes, sir.

Q. Was it on the day of the accident?

A. Yes, sir; after the accident.

Testimony closed.

Adjourned until Thursday, June 7th, 1917, at 10 o'clock A. M.

Morning Session.

Thursday, June 7, 1917.

Mr. Miller addressed the jury on behalf of the defendant; Mr. Jones on behalf of the plaintiff.

372 Also, be it remembered, that the said case was further so proceeded in that the Court orally charged the Jury as follows:

In the District Court of the United States for the Western District of Pennsylvania, October Term, 1914.

No. 1234.

FIDELITY TITLE & TRUST COMPANY, Ancillary Administrator of the Estate of Vernon W. Pancoast, Deceased,

VS.

DUBOIS ELECTRIC COMPANY.

*Oral Charge of the Court.*

THOMPSON, J.:

Gentlemen of the Jury: This action of trespass was instituted against the defendant by Vernon W. Pancoast in his lifetime, to recover for injuries which he sustained on the 12th day  
373 of October, 1912. Mr. Pancoast having died before the case was finally determined, this action survived and is being prosecuted by his ancillary administrator, to recover damages which the deceased would have been entitled to recover had he lived, that is, had death not ensued. The foundation of the action is the negligence charged against the defendant, and in all such actions it is necessary that the plaintiff establish, by the fair preponderance of the evidence, that the defendant was guilty of the negligence charged, and that that negligence was the proximate cause of the injury to the deceased. The plaintiff's case must also be free from any negli-

gence on the part of the deceased, which contributed in any degree to the injury which resulted. Now, by "proximate" cause I mean the direct, the immediate, rather than the remote cause, where the result, by a natural succession of events, follows or flows from the negligence. And a negligent act is the proximate cause of an injury when the injury is the natural and probable result of the negligent act, such a result as ought to have been foreseen as likely to occur, and to have been provided against accordingly. The first question which you will have to determine is, was the defendant company guilty of negligence in erecting, that is, in suspending the banner in the manner in which you find, under the evidence, it was actually suspended. I may say that negligence is the absence of care according to the circumstances. It is the doing of that which ought not to be done, or the neglecting to do that which ought to be done, and as a result of that act or that negligence, injury results. That the defendant company was actually employed in some way to suspend the banner, and did suspend it across Long avenue in the borough of Dubois, between the Commercial Hotel and the Deposit National Bank building, appears clearly under the evidence, and perhaps is not disputed. It also appears that this banner, which was furnished by Mr. Skinner, with a rope attached, on which to suspend it, was fastened on the roof of the Commercial Hotel by the defendant's employees to a cleat, or iron hinge, which Mr. Skinner had given them for that purpose. And it also appears that shortly afterwards, perhaps the next day, the rope broke at the eye of the cleat or hinge, which let the banner down. It also appears that the banner was suspended again, on October 7th, by the employees of the defendant company, that in some way procuring another galvanized iron rope for that purpose. On the second hanging of the banner, the employees of the defendant fastened it on the roof of the Commercial Hotel building by taking two turns of the rope around the chimney, which stood about three feet from the edge of the roof, and then clamping the end of the rope upon the body of the rope or cable itself. That the banner remained suspended until between 4 and 5 o'clock on the evening of October 12th, when the chimney fell, or was pulled over, the banner falling into the street, and some of the bricks of the chimney being precipitated into the street. It appears that the deceased, who was standing with his brother in front of the hotel, was struck by the falling bricks and severely injured. Thus far I have been stating facts which appear not to be in controversy, or at least not seriously in controversy. It is claimed by the plaintiff that the deceased sustained a compound comminuted fracture on the left side of his skull, extending to the interior of the skull. That he was rendered temporarily unconscious, taken into the hotel, given  
375 some temporary treatment, and a little later taken to the hospital, where an operation was performed removing the injured portion of the skull. That he remained in the hospital about three weeks, then went to the hotel, where he stayed perhaps about two weeks; afterwards went to his mother's home in the state of New York, and a little later went to his own home in that state. That

the injury resulted—I am speaking now of the testimony of the plaintiff—in a certain paralysis of the right side, the arm and limb, and a partial paralysis of the tongue, causing difficulty in his speech. That he improved for a considerable time, being able to take part in certain work, but later difficulty developed in the bowels and bladder causing uremic poisoning, followed by convulsions, which resulted in his death in the month of August, 1915.

Now, it is the position of the plaintiff that the rope was attached to the chimney several inches above the flashing, and they ask you to find from the evidence introduced, considering the weight and the size of the banner, the manner in which it was supported, the size and strength of the chimney and the point at which it was attached to the chimney, that it was negligently erected and that this negligence caused the fall of the chimney, and was the proximate cause of the injury to the deceased.

The defendant, on the other hand, denies, in the first place, that it was guilty of any negligence in the erection of the banner. It claims that the banner was fastened in a secure way, not around the chimney above the flashing, but on the flashing at the roof, and in so doing it is claimed by it, it was not guilty of any negligence in so suspending the banner.

376 Now, here I stop to say that you are the exclusive judges of every controverted questions of fact. Where there is any dispute in the evidence, it is for you to determine what the facts are and in doing that you will look at the witnesses themselves, their manner of testifying, their appearance on the stand, any interest they may have or the lack of interest, whether or not the witness appears to be credible, whether or not he is impeached or unimpeached, his means of knowledge about that of which he undertakes to speak, whether there are corroborations or contradictions in the testimony. These and every other suggestion that may come to your minds that would aid you in determining what the actual fact is, and then having determined the facts with reference to any material matter in controversy, you will apply the law as the Court states it to be, to the facts as you find them to be.

If you should find, under all of the circumstances, that the injury was not caused by the negligence of the defendant, you would go no further and would render a verdict in its favor. But if, on the other hand, you should find that the fall of the chimney which injured the deceased, was caused by the negligent manner in which the defendant suspended the banner, you will then pass to another very important and material question in this case, namely, what was the arrangement or agreement between the company and M. O. Skinner, who was the owner, or represented the owners, of the banner, under which the banner was erected.

Now, as a matter of law, I say to you that if the defendant was simply employed to erect the banner and did erect it, the work being completed some days before the accident happened, the defendant would not be liable for the injury caused by the fall of the banner, even if the fall was the result of negligence in its erection, because, in that case, the defendant would have no control

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of the banner after its work of erection was completed. The same would be true if the agreement was to erect the banner, and also to take it down, after the election, in the absence of any proof that under the agreement there was a continuing duty of the company or to the maintenance of the banner in a safe condition, so that persons passing along the street should not be injured thereby. Now, on the other hand, if the arrangement or agreement not only contemplated and provided for the erection of the banner and the taking of it down, but for its maintenance and control during the period of its suspension, then the defendant would be liable if the fall was due to the defendant's negligence in the manner in which it was erected. You will, therefore, undertake to determine as best you can under the evidence, what the arrangement actually was between the parties, because the plaintiff's right of recovery on this phase of the case depends upon the testimony, perhaps, entirely of M. O. Skinner, as to what the contract actually was, he being the one who made the agreement, whatever the agreement was.

Mr. Skinner testified, in one place at least, as follows: "I told them to put the banner up for me, and when the election was over to take it down, telling them I wanted nothing to do with it. I wanted them to attend to it. I didn't want to go on the roof"; that there were two of the Blakesleys present at that time; that the assistant superintendent, Irvin Blakesley, I believe, said in reply: "We will have nothing to do with it"; that Coulson Blakesley said: 378 "We will take the matter up", or words to that effect, and that some time later while he was still at the office, Coulson Blakesley directed two men to go along and put up the banner.

Now the defendant's position is very different. Coulson Blakesley I believe, and Mr. Irvin Blakesley, testified that they were not together in the office at all at that time. Irvin said that he met Mr. Skinner outside of the office, some distance away, and that he asked him to put the banner up and take it down, and that he said they would have nothing to do with it. That later he appeared in the office and asked Mr. Coulson Blakesley—I am speaking of their testimony now—to put the banner up, or perhaps to put it up and take it down, and that he said they were too busy, their men were out on the line, but a little later two of the men came in and he directed them to go with Mr. Skinner and put up the banner. Witnesses perhaps have been called to substantiate in some way this testimony on the part of the defendant. It, therefore, becomes a question of fact for you to determine under the evidence, what the agreement or arrangement in fact was. I shall not undertake to detail the testimony. If you find that there was no such arrangement as that testified to by Mr. Skinner, then there would be no testimony to support the plaintiff's position that there was a duty resting on the defendant to maintain the banner in proper shape after it was erected, and the plaintiff could not recover. On the other hand, if you find that the conversation with reference to the banner and its erection, was as testified to by Mr. Skinner, then you will determine whether that proposition was accepted by the defendant, and thus became the arrangement under which 379 the banner was erected. If so, then you will determine from



the words used in that conversation, whatever you find them to be, what was the arrangement contemplated and intended by the parties with reference to the banner when erected. Did it include the maintenance of the banner while suspended, or did it not? You would determine this from the conversation which the parties had, primarily, and may consider the case of the parties subsequently, so far as their actions would throw light and help to interpret what the parties actually contemplated, intended and understood with reference to the defendant's duty and understanding. What was done when the banner fell after it was first erected? When the defendant put it up the second time, did it do so on its own motion because it fell when erected under the arrangement, to maintain the banner in place which it had erected; or was the second suspension of the banner in obedience to the request of Skinner to erect it again? That becomes a material matter. Here again, is a controverted question of fact, Skinner testifying, as I remember, that it was erected by the defendant the second time without being requested to do so. Witnesses for the defendant, on the contrary, testified that Skinner requested them to put it up again, and that following this request they did so. If there is any other fact or circumstance in the case in reference to the erection with regard to the action of the parties, that will in any way help you to determine what the contract or arrangement actually was between the parties, you will remember it, consider it and give it proper effect.

Now, to recapitulate: If the banner was not negligently erected and under the circumstances the defendant was not guilty of  
380 the negligence which caused the injury to the deceased, there can be no recovery in this case. And even if the injury was caused by the negligent erection of the banner, still the plaintiff could not recover if the contract was simply for its erection, or for its erection and taking down, there being no right of control or duty of maintenance between the erection of the banner and the time of the accident. But, if you find by a fair preponderance of the testimony, that the negligent erection of the banner by the defendant was the cause of the fall of the chimney and was the proximate cause of the injury to the deceased, that the deceased was not guilty of any contributory negligence, and that under the contract or arrangement the defendant was to erect the banner, take it down after the election and in the meantime maintain it in a safe condition while suspended, then the plaintiff would be entitled to recover and you would pass to the question of damages, remembering that the burden of proof is upon the plaintiff to establish, by the fair preponderance of the testimony, the facts necessary for a recovery.

Now, with reference to the damages. In case you should find these material facts in favor of the plaintiff, and only in that case, I would instruct you as follows: This action having been brought by Mr. Pancoast in his lifetime, it survives to his personal representative and the damages recoverable are the same as Mr. Pancoast could have recovered had he lived, in other words, had death not ensued. The plaintiff would be entitled to recover, first, the several items of expense incurred by the deceased for medicines, medical care, surgical

care and treatment, hospital expenses, expense for nursing, and any other items of expense which the evidence shows were necessary, by reason of the injury received, in the care and treatment of the deceased, in alleviating his suffering and in endeavoring to effect a cure. In addition to this, you would allow the present worth or value of such amount as fairly represents his loss of earning power during the period between the time of the accident and the date of his death in which he was wholly disqualified from labor; and also such sum as you find represents the diminution or loss of his earning power during the period in which he was only partially disqualified from labor, and, in addition to this, plaintiff would be entitled to recover for the pain and suffering which Mr. Pancoast endured from the time of his injury to the time of his death, which was the result of or caused by the injury complained of. As to this amount, I can only say that you should allow such a fair and reasonable amount as under all the circumstances, considering the nature of the injury, the character and extent of his pain and suffering, as would be a fair and just compensation therefor. These amounts in the aggregate would constitute your verdict. You would consider, of course, the question of damages only in case you find a verdict in favor of the plaintiff.

By Mr. Jones: If your Honor please, I have heard nothing about the damages recoverable after his death.

By the Court: It would seem that the injured party would not be entitled to recover damages by reason of his death. In other words, there are two separate and distinct actions.

(Discussion.)

By Mr. Miller: I would like to have your Honor explain to the jury as to the effect of the testimony impeaching the reputation of M. O. Skinner, that that is substantive testimony in this case, to be taken into consideration, and if they find from this testimony that M. O. Skinner is a man whose general reputation for truth and veracity in the community in which he lives, is bad, they have a right to give that proper and sufficient consideration in determining and passing upon the credibility of M. O. Skinner.

By Mr. Jones: I have no objection to that instruction, but I would like to have the question of damages ruled on first.

By the Court: Gentlemen, at the request of counsel for plaintiff, and in view of one or two of the decisions of the Supreme Court of Pennsylvania, I further instruct you on the question of damages, that if you should find, under all the evidence—and that is a question for you—that the death of Mr. Pancoast was not the result of the injury in question—I am referring now to his death—the sum of the items which I mentioned, for pain and suffering, for loss or diminution of earning power, would constitute your verdict. If you should find that the death of Mr. Pancoast resulted from the injury in question, then you would go further and determine as best you can from the evidence, considering the decedent's age, his habits of life, if the evidence disclosed such, his

bodily strength, the condition of his health, his ability and disposition to labor, what was the reasonable expectancy of his life; that is, how long would he probably have lived had the injury not occurred, and you will allow him for the loss of earning power, that is, the present worth of such sum of money as you should find he would probably have earned from the date of his death during the reasonable expectancy of his life. This sum, in that event, together with the several amounts which you find he was entitled to receive up until the time of his death, as I have heretofore stated, would constitute your verdict.

Plaintiff's counsel have presented two points which I have not affirmed and will not read.

Defendant's counsel have presented several points the first two of which I will read.

"First. If the defendant is liable to the plaintiff, it must be on account of the negligent performance of some duty that the defendant owed to the plaintiff, or negligent omission on behalf of the defendant to do something that it was under legal obligations to do."

Affirmed.

"Second. The fact that some other person or party may or may not be liable to the plaintiff is entirely immaterial and adds nothing to the liability of the defendant."

Affirmed.

The other points are refused.

384 Counsel for defendant have asked me to give further instructions with reference to a case where a witness's reputation for truth and veracity has been impeached. That is a competent line of testimony as affecting the credibility of the witness, and it is proper for the jury to take into consideration, in determining the question, what weight or credibility they will give to his testimony.

By Mr. Miller: Before the jury retires, counsel for defendant excepts to the refusal by the Court of defendant's third, fourth, fifth, sixth, seventh, eighth and ninth points. The defendant also excepts to the general charge of the said Court, referring to the basis for the recovery of damages, if the jury should find the plaintiff entitled to recover damages, in so far as it permits a recovery beyond the time of decedent's life. We now pray for an exception and a bill sealed.

Exceptions allowed.

By Mr. Jones: Counsel for plaintiff excepts to the refusal of plaintiff's two points.

Exceptions allowed.

And the said case was further so proceeded in that the defendant on the whole testimony in the case requested the Court to charge the jury as follows:

“Third. All the testimony shows that the defendant erected the banner in question as the employee of M. O. Skinner, and at his instance and request, and was under no contract obligation with Skinner to keep and at all times maintain said banner in a safe condition, therefore, the defendant would not be liable to the plaintiff for the fall of said banner, inasmuch as said banner did not fall until several days after it had been erected by the defendant company, and its contract with Skinner had been entirely performed and completed.”

Which point was answered by the Court as follows:

“The other points are refused.”

Whereupon the defendant before the jury retired excepted to said answer as follows:

“Before the jury retires counsel for defendant excepts to the refusal by the Court of defendant’s third, fourth, fifth, sixth, seventh, eighth and ninth points.”

And an exception was noted by the trial judge, to to which exceptions the defendant now prays that a bill may be sealed.

And the said case was further so proceeded in that the defendant on the whole testimony in the case requested the Court to charge the jury as follows:

“Fourth. The contract for the erection of the said banner having been made with Skinner, and being only for the erection of the banner, or at most to erect and take it down, and the plaintiff not being a party thereto in any way, cannot recover from the defendant for its faulty or negligent performance of the contract with Skinner, even if such contract were faultily and negligently performed by the defendant.”

Which point was answered by the Court as follows:

“The other points are refused.”

Whereupon the defendant before the jury retired excepted to said answer as follows:

“Before the jury retires counsel for defendant excepts to the refusal by the Court of defendant’s third, fourth, fifth, sixth, seventh, eighth and ninth points.”

And an exception was noted by the trial judge, to to which exceptions the defendant now prays that a bill may be sealed.

And the said case was further so proceeded in that the defendant on the whole testimony in the case requested the Court to charge the jury as follows:

"Fifth. As it appears by all the testimony in this case that the banner in question was erected by the defendant for and at the instance of M. O. Skinner, and that the erection was complete, and the defendant was not in possession, charge or control of the banner at the time it fell, there is no such connection between the faulty and negligent erection of the banner, if such existed, and the happening of the accident as to make the defendant liable to the plaintiff for the injury received, and the verdict must be for the defendant."

Which point was answered by the Court as follows:

The other points are refused."

387 Whereupon the defendant before the jury retired excepted to said answer as follows:

"Before the jury retires counsel for defendant excepts to the refusal by the Court of defendant's third, fourth, fifth, sixth, seventh, eighth and ninth points."

And an exception was noted by the trial judge, to to which exceptions the defendant now prays that a bill may be sealed.

And the said case was further so proceeded in that the defendant on the whole testimony in the case requested the Court to charge the jury as follows:

"Sixth. Under the eleventh paragraph of plaintiff's statement of claim in this case, which purports to set out the wrongful act which caused the injury to the plaintiff and under the evidence that the defendant was not in possession of the banner at the time it fell the plaintiff cannot recover and the verdict must be for the defendant."

Which point was answered by the Court as follows:

"The other points are refused."

Whereupon the defendant before the jury retired excepted to said answer as follows:

"Before the jury retires counsel for defendant excepts to the refusal by the Court of defendant's third, fourth, fifth, sixth, seventh, eighth and ninth points."

And an exception was noted by the trial judge, to to which exceptions the defendant now prays that a bill may be sealed.

388 And the said case was further so proceeded in that the defendant on the whole testimony in the case requested the Court to charge the jury as follows:

"Seventh. Under all the testimony in the case the defendant company was simply an employee of Skinner, engaged to erect the banner in question for a compensation according to the services rendered, and that it had no other or further connection with said banner, that it did not fall while in the possession or control of the defendant, nor while in process of erection; therefore there was no such relation,

fractural or otherwise, between the plaintiff and the defendant as enable Pancoast or his representative to recover for the faulty or negligent erection of the banner; even if it were so erected and your verdict must be for the defendant."

Which point was answered by the Court as follows:

"The other points are refused."

Whereupon the defendant before the jury retired excepted to said answer as follows:

"Before the jury retires counsel for defendant excepts to the refusal by the Court of defendant's third, fourth, fifth, sixth, seventh, eighth and ninth points."

And an exception was noted by the trial judge, to to which exceptions the defendant now prays that a bill may be sealed.

And the said case was further so proceeded in that the defendant on the whole testimony in the case requested the Court to charge the jury as follows:

"Eighth. The mere fact that Vernon W. Pancoast was injured on October 12, 1912, by the falling of this banner, or by the falling of the bricks in the flue to which said banner was attached, will not make the defendant liable in this case. The testimony shows that on the day of the accident the defendant owed no duty to the plaintiff and that the defendant had not negligently omitted to do something on behalf of the defendant which the defendant was under legal obligations towards the plaintiff to do, therefore, the plaintiff cannot recover in this action and your verdict must be for the defendant."

Which point was answered by the Court as follows:

"The other points are refused."

Whereupon the defendant before the jury retired excepted to said answer as follows:

"Before the jury retires counsel for defendant excepts to the refusal by the Court of defendant's third, fourth, fifth, sixth, seventh, eighth and ninth points."

And an exception was noted by the trial judge, to to which exceptions the defendant now prays that a bill may be sealed.

And the said case was further so proceeded in that the defendant on the whole testimony in the case requested the Court to charge the jury as follows:

"Ninth. Under the law, the pleadings and the evidence the plaintiff is not entitled to recover and the verdict must be for the defendant."

Which point was answered by the Court as follows:

"The other points are refused."



Whereupon the defendant before the jury retired excepted to his answer as follows:

"Before the jury retires counsel for defendant excepts to the refusal by the Court of defendant's third, fourth, fifth, sixth, seventh, eighth and ninth points."

And an exception was noted by the trial judge, to to which exceptions the defendant now prays that a bill may be sealed.

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*Certificates.*

I hereby certify that the foregoing is a true transcript of all the evidence taken in the case of Fidelity Title & Trust Company, Ancillary Administrator of the Estate of Vernon W. Pancoast, deceased vs. Dubois Electric Company, at No. 1234, October Term, 1914 together with the offers of counsel, objections thereto and the rulings of the Court thereon, and the Charge of the Court, with exceptions of counsel thereto.

L. D. IAMS,  
*Official Reporter,*  
By M. GANGWISCH.

Pittsburgh, Pa., February 25, 1918.

I, W. H. S. Thomson, Judge of the District Court of the United States for the Western District of Pennsylvania, certify that the foregoing is a correct transcript of all the evidence, offers of counsel, the objections thereto and the rulings of the Court, and the exceptions thereto, and the Charge of the Court, with exceptions of counsel thereto, in the case of Fidelity Title & Trust Company, Ancillary Administrator of the Estate of Vernon W. Pancoast, deceased vs. Dubois Electric Company, at No. 1234, October Term, 1914; all of which, so certified, is ordered to be filed and to become a part of the record, this 25th day of February, 1918.

W. H. S. THOMSON,  
*Trial Judge.*

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And be it further remembered that the case was further proceeded in that the Court submitted to the jury the whole case upon the evidence and the jury returned a verdict against the defendant, and in favor of the plaintiff, in the sum of Ninety-four Hundred Dollars (\$9,400.00), whereupon the defendant moved the Court for a new trial for the following reasons:



the District Court of the United States for the Western District of Pennsylvania, October Term, 1914.

No. 1234.

FIDELITY TITLE & TRUST COMPANY, Ancillary Administrator of the Estate of Vernon W. Pancoast, Deceased,

vs.

DUBOIS ELECTRIC COMPANY.

*Motion for New Trial.*

And now June —, 1917, the defendant by its counsel, Miller & Hartswick, move for arrest of judgment, and a new trial in this case for the following reasons:

993 First. The verdict is not supported by the evidence.

Second. The verdict is against the weight of the evidence.

Third. The Court erred in the admission and exclusion of testimony.

Fourth. The Court erred in refusing the third, fourth, fifth, sixth, seventh, eighth, ninth points of the defendant.

Fifth. The evidence is insufficient to submit to the jury or to support a finding by the jury that there was any contract or arrangement between M. O. Skinner and the defendant under which it was the duty of the defendant to maintain the banner between the time it was erected and the date of the action in this case; and there was no sufficient testimony to justify the submission of this question to the jury, or to sustain a finding by the jury that there was such a contract or arrangement.

MILLER & HARTSWICK,  
*Attorneys for Defendant.*

On which motion a rule was granted on the plaintiff to show cause why judgment should not be arrested and a new trial granted, which motion was subsequently argued before the Court and the motion denied in the following opinion and order of the Court:

394 In the District Court of the United States for the Western  
District of Pennsylvania, October Term, 1914.

No. 1234.

FIDELITY TITLE & TRUST COMPANY, Ancillary Administrator of  
the Estate of Vernon W. Pancoast, Deceased,

VS.

DUBOIS ELECTRIC COMPANY.

*Opinion.*

THOMSON, J.

In its motion for a new trial defendant's position as urged upon the Court at the oral argument and in the counsel's brief, is that binding instructions should have been given for the defendant. Perhaps there is little else that could have been urged. No error is charged as to the admission or rejection of testimony. It could not well be claimed that the defendant company was not negligent in the erection of the banner, or that that negligence was not the proximate cause of the death of Mr. Pancoast. Such negligence  
395 was not only found by the jury, but that finding was based upon evidence so strong and convincing that there was scarcely any escape from it.

The law is not solicitous or anxious to relieve a person guilty of negligence, from the liability which ordinarily follows its commission. In fact, it never does so unless there is a compelling reason therefor, one which would make the application of the general rule unjust under the special circumstances. And evidently, the only possible reason which can exonerate a contractor from liability for the negligent erection of a structure when once delivered to the owner, is because when out of control he has no power to relieve against it.

It was the Court's endeavor to conform strictly to the decision of the Circuit Court of Appeals when this case was last before them and wherein it was held that binding instructions should have been given for the defendant. It was the duty of the trial Court, however, to keep steadily in mind that the opinion of the Appellate Court was based on the evidence as it then stood on the record, and that on a re-trial of the case the Court's action must necessarily depend on the facts of the case as they then presented themselves.

Keeping in mind the principle that a motion for binding instructions is a demurrer to the evidence, in which every fact shown and every fair inference deducible from the facts shown, must be assumed in favor of the plaintiff to be true, let us look at the testimony.

Mr. M. O. Skinner, who procured the services of the defendant company in relation to the banner, after stating that when the banner was procured and taken to the Acorn club and examined, said:

"I went to the Dubois Electric Company and asked them to put the banner up for me, and when the election was over to take it down, telling them I wanted nothing to do with it; I wanted them to attend to it. I didn't want to go on the roof. After some little discussion, two of the employes of the Electric Company went with me to the club rooms and secured the banner, and brought it down."

He then speaks of the bill which was subsequently rendered and what the bill contained, and continues:

"Q. Were you ever on the roof of the hotel building?

A. No, sir.

Q. Was there anything said in your dealings with the Electric Company for the hanging of this banner, about your control of it?

A. No, sir.

Q. Were you to have control over it?

A. No, sir.

\* \* \* \* \*

Q. What did you tell them at the time of your employment of them, that they were to do with respect to the banner, for which you could be expected to pay them?

By Mr. Miller: Objected to, as the proper question is, what was the conversation between them, what was the contract?

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By the Court: Yes.

By Mr. Jones:

Q. State it that way.

A. Just as I stated before, I went to the Electric Company and asked them to put up the banner and take it down after the election, stating to them that I didn't want to have anything to do with it; I wouldn't go on the roof, and wanted them to attend to it. That was my statement at the time.

Q. Did you give them anything with which to suspend this banner.

A. We had a rope that came with the banner, a wire rope, and we furnished iron cleats to be screwed to the buildings on the other side of the street, and the banner was to be fastened to those cleats.

Q. What was the nature of those cleats.

A. The ones furnished were strap hinges, large eyes sufficiently large to fasten into it.

Q. Did you give it to the employees of the company when they got the banner.

A. Yes, sir.

Q. Did they report to you at any time about the erection of the banner.

A. After the banner had been up, I think the first night it came down. The next day they replaced it. That evening they reported

to me that they had restrung the banner with a wire cable, fastening it around the flashing of the chimney on the roof.

Q. Did they ever report to you that they had fastened it to the cleats.

Objected to.

398 A. No, sir; they did not.

Q. I understood you to say that the first report was made to you after they had fastened it to the chimney.

A. Yes, sir.

Q. And that the banner had already come down from the first fastening, wherever that may have been.

A. That was the report, that the banner had come down.

Q. Did you know that yourself.

A. No, sir.

Q. Did you direct them to go up their and fasten it to the chimney.

A. No, sir.

Q. Did you have any conversation with them between the time that they received the banner from you, and the cleats, and the time that they fastened it to the chimney?

A. No sir.

This is followed by his testimony that he did not make any arrangement with the Commercial Hotel, or the Deposit National Bank on the opposite side of the street, as to the fastening of the banner between the buildings, did not see anyone about it or obtain permission to erect the banner, and does not know who did.

On cross-examination, on page 16 of the notes of testimony, Mr. Miller asked:

"Q. You say you went there and you asked them to put this banner up and to take it down after the election.

A. Yes, sir.

Q. That is what you asked them to do?

399 A. I told them I wanted them to take the banner and put it up, and take it down and attend to it, that I didn't want to have anything to do with it."

Again, on page 19, defendant's counsel asked the question:

"What you asked them to do then, was to put this banner up and to take it down after the election?

Objected to.

Q. Is that what you said?

A. I went to them and asked them if they would put the banner up and take it down and attend to it for me, and that I didn't want to have anything to do with it; I couldn't go up on the roof, and couldn't attend to it."

On further cross-examination by Mr. Miller, the witness testified as follows:

"Q. Do you remember of talking with Mr. Austin Blakesley and R. B. Blakesley since that time, and saying to them that what you meant by that was that you had an understanding that you were going to ask them or request them to take it down after the election, but that there was no arrangement made at that time for them to take it down?

A. In my testimony once before I used the word "understanding." I said that we understood it that way. There was an understanding when it was simply my intention that I would have them do that, and I had no right to say that they understood it that way, and that matter was discussed by me with Mr. Austin Blakesley.

Q. At the time you left the office down there, you simply  
400 had the intention of having them take the banner down after the election?

A. Yes.

Q. And there wasn't any definite arrangement made at that time that they were to take it down after the election?

A. No, sir.

By Mr. Jones:

Q. When you speak of a contract, to what do you refer?

A. I referred that there was no contract, written contract between myself and the electric company.

Q. You had the conversation with them that you have testified to, about their putting it up, taking it down, attending to it, and that you were to have nothing to do with it?

A. Yes, sir.

Q. And after that they sent men with you to do the work?

A. Yes, sir.

Q. Did they charge you for it?

A. Yes.

Q. You paid them for it?

A. Yes, sir.

Q. Was there any other conversation than that which you testified  
to?

A. No, sir.

Q. Was there any other arrangement than what you have testified  
to?

A. No, sir.

401 By Mr. Miller:

Q. Do you mean at that time you had an arrangement with them by which they were to put up this banner, and attend to it while it was up, and take it down after the election?

A. I mean simply this: I went there and asked them to put the banner up and to take it down after the election, and told them I didn't want anything to do with it, I didn't want to go on the roof, and I wanted them to attend to it. That was my real intentions."

From this testimony, which embodied the contract of employment, whatever it was, under which the banner was erected, paid for and taken down, it is insisted that the Court should have interpreted its meaning, drawn the proper inference therefrom, and pronounced that inference as a matter of law.

This I could not do for the following reasons:

First. Whether the conversatioon occurred as detailed by Mr. Skinner, was a question of fact for the jury. But assuming that it did occur as detailed, the meaning of the words, that is, the terms of the employment as embodied in the words used, whether the company was to have control between the putting up and the taking down, was an inference of fact, and not a conclusion of law. Inference- of fact are for the jury.

Second. Such interpretation by the Court as insisted upon by the defendant, must necessarily be made without the aid of circumstances and the acts of the parties, which often throw light upon the words used and help greatly to interpret them.

402 Third. A very significant fact on the question of control, is that when the banner first came down, the defendant put it back again, upon its own initiative. This fact (and if contra-verted, a question for the jury) might be considered persuasive evidence in favor of the inference which the plaintiff insists should be drawn from the words of employment, as to their meaning and scope.

Fourth. In relation to a temporaray structure such as this a banner flying in the breeze of which no one could be said to be in actual physical possession, where maintenance might almost be said to be inherent in the work of suspension undertaken by the defendant it is not improper to draw such inference of control from the words of employment, if the words used fairly bear such construction.

Fifth. The words of employment standing along will not only permit of such construction but seem to justify the inference of intended control. It being conceded that under the words of employment the defendant was required to put the banner up and take it down, what would be the fair meaning to be attributed to the words, "I didn't want to go on the roof; I wanted nothing to do with it; I wanted them to attend to it; I wanted them to look after it"? It is certainly not an unfair conclusion that these words intended and contemplated control of the banner in the interim. But, whatever inference should be properly drawn, it is a conclusion of fact and not a matter of law, and therefore for the jury.

403 Sixth. The authorities sustain the position of the Court. In *McFarland vs. Newman*, 9 Watts, 55, Chief Justice Gibson said:

"Now it is obvious that the sense of the words used in the conversation, and what the parties meant to express by them, is for the jury to determine, and not for the Court. It is the conceded prov-

ince of the Court to expound the meaning of an instrument, but that it extends not to words uttered, of which there can be no tenor, is evident from the uniformity with which it is spoken of in reference to the interpretation of writing."

The same learned Judge in *Sidwell vs. Evans*, 1" *Penrose*, 383, said:

"The construction of written evidence is for the Court and of parol evidence for the jury."

In *Philadelphia, for use, vs. Stewart*, 201 Pa., 526, the Supreme Court said:

"The contract was partly oral and partly in writing. And the evidence was of such nature as to clearly, under the authorities, draw the whole to the jury as an oral contract. What the parties said and what they meant by what they said was for the jury to answer. \* \* \* said Gibson, C. J., in *McFarland vs. Newman*, 9" *Watts*, 55; 'The construction of an oral agreement belongs to the jury and parol evidence connected with a writing draws the whole from the Court, is so often repeated in our reports that I forbear to enumerate the cases.' This rule has been invariably followed all through our subsequent case. And this rule the learned Judge of the Court below applied in this case."

Any apparent conflict of authorities on this matter grows out of the differing state of facts in the several cases. If the oral evidence is of a kind 'that different inferences cannot be drawn from it,' it is then the Court's duty to take the question from the jury.

*Insurance Co. vs. Johnson* 105 Fed. 286.

In conclusion, the finding of the jury having established on testimony well supporting it, that the defendant company was negligent in the erection of the banner, and that this negligence was the proximate cause of the injury which resulted in the death; the defendant company beyond question contracted to put the banner up and take it down, and the terms of the contract of employment being such as to warrant the inference which the jury drew, that the defendant was in control of the banner after its suspension, the motion for a new trial is overruled.

And in pursuance of said opinion and order of Court judgment was entered on the verdict against the defendant and in favor of the plaintiff on January 18, 1918, in the sum of Nine thousand four hundred dollars (\$9400.00), with costs to which action of Court the defendant excepts and now prays that a bill may be sealed.

We, counsel for the defendant, ask the Court to grant the exceptions to the Court's ruling, permitting the plaintiff to amend its statement as hereinbefore set forth, and its answers to the defend-



ant's points, or request for instructions to the jury, and to the Court's ruling denying to the defendant and refusing the motion for new trial.

And now in furtherance of justice and that right may be done the defendant presents the foregoing as its bill of exceptions in the above entitled cause, and prays that the same may be settled as requested and allowed by Law.

MILLER & HARTSWICK,  
*Attorneys for Defendant.*

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*Notice.*

To Sterrett & Acheson, Esquires, Attorneys for Plaintiff:

You are hereby notified that defendant, in order to prosecute a writ of error from the judgment of the Court in the above entitled case, has prepared and will present on the 25th day of February A. D. 1918, at 10 o'clock A. M., the foregoing bill of exceptions for approval of the judges of the United States District Court for the Western District of Pennsylvania.

MILLER & HARTSWICK,  
*Attorneys for Defendant.*

Service of the above notice and foregoing bill of exceptions accepted this 25th day of February A. D. 1918.

STERRETT & ACHESON,  
*Attorneys for Plaintiff.*

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*Order of Court.*

And now, to-wit; February 25th, 1918, the within exceptions presented, and on motion of the attorneys for the defendant it is ordered that all the evidence taken upon the trials be duly certified by the acting official stenographer, and filed, together with the charge of the Court and the rulings of the Court upon the defendant's points, to be also filed so as to become a part of the record, and the exceptions are allowed and this bill sealed.

W. H. S. THOMSON.

408

*Assignments of Error.*

And now, to wit, the 25th day of February, A. D. 1918, the defendant, the Dubois Electric Company, by its counsel, Miller & Hartswick, files the following specifications and assignments of error upon which it relies to sustain the writ of error prayed for.

First. The Court erred in allowing the filing of plaintiff's amended statement on April 27th, 1916, over the defendant's objections and exceptions, which amended statement, objections, exceptions of defendant and order of the Court are as follows:

*Plaintiff's Amended Statement.*

The Fidelity Title & Trust Company, Ancillary Administrator of the estate of Vernon W. Pancoast, deceased, plaintiff above named, claims and demands of the Dubois Electric Company, defendant above named, the sum of \$50,000, upon a cause of action whereof the following is a statement.

1. The above action was instituted by the said Vernon W. Pancoast in his lifetime, to recover of the defendant damages due to an injury inflicted on him through the negligence of the said Dubois Electric Company, as hereinafter set forth.

2. The said Vernon W. Pancoast was at the time of bringing this suit, and at all times herein mentioned, a citizen of the State of New York.

409 3. The said Dubois Electric Company is, and at all times herein mentioned, was a corporation organized and existing under the Laws of the State of Pennsylvania, and a citizen of the State of Pennsylvania and a resident of the Western District thereof.

4. The amount in controversy in this suit, exclusive of interest and costs, exceeds the sum of \$3,000.

5. The said Vernon W. Pancoast died on August 7, 1915, and after his death Letters of Administration on his estate were granted by the Surrogate of Cattaraugus county, New York, to Clara N. Pancoast, and thereafter the said Fidelity Title & Trust Company of Pittsburgh, took out Ancillary Letters of Administration on the estate of said Vernon W. Pancoast, for the purpose of continuing the above action, and thereafter, to wit: On or about November 7, 1915, the said Fidelity Title & Trust Company was, upon order of this Honorable Court, duly substituted as plaintiff, for the purpose of continuing the above action, and the record therein accordingly amended, and the said Fidelity Title & Trust Company now makes the within amended statement of claim.

6. On or about October 7, 1912, the said Dubois Electric Company, acting through its officers, agents, or employees, constructed, erected, suspended and maintained across Long avenue, Dubois, Pennsylvania, between the buildings of the Deposit National Bank, on the one side of said street, and the Commercial Hotel building, on the other side of the street, a sign or banner about twenty-five (25) feet in width and from sixteen (16) to twenty (20) feet in depth.

410 7. The said sign or banner was made of rope mesh or netting, upon which there was spread out and fastened thereto a large cloth fabric, containing a painted political display or advertisement. The display or advertisement was designed for quite temporary use, as it contained the names and portraits of a candidate for each the office of President and Vice President of the United

States to be voted for at the general election on November 5th, following.

8. The said sign or banner was suspended by means of a steel cable, to which it was attached, the one end of which cable was fastened to the said Bank building and the other end to said hotel building. The lower corners of said sign or banner were fastened by ropes, likewise one to said bank building and the other to said hotel building. At the point on Long avenue at which said sign or banner was suspended, said street was forty (40) feet wide from curb to curb, or about sixty (60) feet from building to building. The effect of fastening the said sign or banner by its four corners was to give it the character of a sail, and, exclusive of the steel cable, to which it was attached, it weighed about forty (40) pounds.

9. In constructing, erecting, suspending and maintaining the said sign or banner across Long avenue, the said Dubois Electric Company, acting through its officers, agents or employees, negligently and carelessly used, as an anchor for fastening the one end of the steel cable to which said sign or banner was attached, a brick chimney standing near the edge of that part of the roof of said hotel building which overhangs Long Avenue. The fastening of the said sign or banner to said chimney rendered said chimney unsafe  
411 and insecure, and the negligent and careless manner in which the Dubois Electric Company, through its officers, agents or employes, made said fastening, rendered said chimney all the more unsafe and insecure.

10. On or about October 12, 1912, and while the said sign or banner as thus constructed, erected, suspended and maintained, was under the control and supervision of said Dubois Electric Company, the stress or strain of said sign or banner on said chimney caused a part of said chimney to pull from off the roof of said hotel building, and in falling to the street below, some of the bricks from the chimney thus pulled down by said sign or banner, struck the said Vernon W. Pancoast, a pedestrian on said street, on his head and other parts of his body thereby inflicting grievous bodily injuries on said Vernon W. Pancoast to the extent as hereinafter set forth.

11. The falling of the bricks from said chimney which caused the bodily injuries to said Vernon W. Pancoast, as hereinbefore stated, was due to the negligence of the Dubois Electric Company, its officers, agents or employes, in the use of said chimney, as a fastening for said sign or banner as hereinabove set forth.

12. The bodily injuries sustained by the said Vernon W. Pancoast, through being struck by said falling bricks, consisted of a compound comminuted fracture of the skull, a fracture or contusion of the right arm and shoulder, and a fracture of the bones of one foot. The aforesaid injury to the said Vernon W. Pancoast's skull, necessitated the removal of a considerable portion of his skull, by  
412 reason of which the said Vernon W. Pancoast's life was constantly in extreme peril or jeopardy, on account of the fatal

effect which a very slight injury to his head would have probably produced. The said skull injury and the necessary removal of a portion thereof caused said Vernon W. Pancoast to lose a considerable quantity of brain substance, to the permanent injury of his brain. The injury to said Vernon W. Pancoast's brain seriously impaired his thinking and reasoning powers, and produced a partial paralysis of his stomach, kidneys and bladder and a paralysis of his tongue, right arm and hand, and right side generally and impaired his power of speech, totally unfitting him for following his business of glass manufacturer, or any other business, and greatly incapacitating and inconveniencing him in the performance of the ordinary functions of life.

13. In order to relieve himself as much as possible from his physical and mental condition due to his said injuries, the said Vernon W. Pancoast expended large sums of money in the payment of hospital bills, bills for medical and surgical attention, nurses' services, and other necessary expenses, amounting to upwards of \$2,000.00.

14. At the time he received the injuries above mentioned the said Vernon W. Pancoast was forty-three years old, in good physical condition, and with a reasonable expectation of a long life before him. He was then, and for a long time had been, a man of large business capacity and interests, particularly in the manufacture of glassware, and by reason of his well known ability to conduct and carry on successfully a large glass manufacturing business, his earning  
413 power, at the time of his receiving said injuries was great.

The injuries which he received, as hereinabove stated, rendered the said Vernon W. Pancoast totally unfit for conducting the glass manufacturing business or any other business, by altogether destroying his capacity therefore. By reason of this fact, the said Vernon W. Pancoast's large earning power at and prior to the time he received said injuries, was totally destroyed, to his great pecuniary loss and damage. Furthermore, by reason of said injuries the said Vernon W. Pancoast endured great physical pain and suffering, and by reason of said injuries continued to endure great physical pain and suffering for the remainder of his life.

15. Wherefore, by reason of the wrongs done the said Vernon W. Pancoast by the said Dubois Electric Company, as hereinbefore set forth, on account of which the said Vernon W. Pancoast instituted this action in his lifetime, the said Fidelity Title & Trust Company, Ancillary Administrator of the estate of Vernon W. Pancoast, deceased, hereby claims and demands of the said Dubois Electric Company, as damages for the said wrongs done the said Vernon W. Pancoast, the sum of \$50,000.

STERRETT & ACHESON,  
*Attorneys for Plaintiff.*

STATE OF PENNSYLVANIA,  
County of Allegheny, ss:

Before me, the undersigned authority, personally appeared Alex P. Reedy, who, being duly sworn, according to law, deposes  
414 and says that he is assistant trust officer of the Fidelity Title & Trust Company, Ancillary Administrator of the estate of Vernon W. Pancoast, deceased, plaintiff within named, and that the facts set forth in the foregoing amended statement are true and correct, to the best of his knowledge, information and belief.

ALEX P. REEDY.

Sworn to and subscribed before me this 24th day of April A. D. 1916.

[SEAL.]

MARY M. HEDDEN,  
Notary Public.

My commission expires January 19, 1919.

To the Within Defendant:

You are required to file an affidavit of defense to this statement within fifteen days from the service hereof.

STERRETT & ACHESON,  
Attorneys for Plaintiff.

415 *Objections to Filing an Allowance of Amended Statement*

(a) That more than two years have elapsed since the cause of action arose and the Statute of Limitations is a bar to any new cause of action.

(b) The statement proposed to be filed is a radical departure from the original and ending statement and comes too late by reason of the Statute of Limitations.

If said amendment is permitted the defendant excepts thereto and prays that an exception may be allowed.

*Order of Court.*

And now, to wit: April 27, 1916, on motion of Sterrett & Acheson, attorneys for Plaintiff, within amended statement of claim is hereby allowed and ordered to be filed.

PER CURIAM.

Exception allowed by the Court.

Exception considered and exception allowed April 27, 1916.

PER CURIAM.

416 Second. The Court erred in answer to the defendant's third point for charge, which point and answer are as follows:

"3rd. All the testimony shows that the defendant erected the banner in question as the employee of M. O. Skinner, and at his instance and request and was under no contract obligation with Skinner to keep and at all times maintain said banner in a safe condition, therefore, the defendant would not be liable to the plaintiff for the fall of said banner, inasmuch as said banner did not fall until several days after it had been erected by the defendant company, and its contract with Skinner had been entirely performed and completed."

"Answer: The other points are refused."

Third. The Court erred in answer to the defendant's fourth point for charge, which point and answer are as follows:

"4th. The contract for the erection of the said banner having been made with Skinner, and being only for the erection of the banner, or at most to erect and take it down, and the plaintiff not being a party thereto in any way, cannot recover from the defendant for its faulty or negligent performance of the contract with Skinner, even if such contract were faultily and negligently performed by the defendant."

"Answer: The other points are refused."

Fourth. The Court erred in its answer to the defendant's fifth point for charge which point and answer are as follows:

117 "5th. As it appears by all the testimony in this case that the banner in question was erected by the defendant for and at the instance of M. O. Skinner, and that the erection was complete, and the defendant was not in possession, charge or control of the banner at the time it fell, there is no such connection between the faulty and negligent erection of the banner, if such existed, and the happening of the accident as to make the defendant liable to the plaintiff for the injury received, and the verdict must be for the defendant."

"Answer: The other points are refused."

Fifth. The Court erred in answer to the defendant's sixth point for charge, which point and answer are as follows:

"6th. Under the eleventh paragraph of the plaintiff's statement of claim in this case, which purports to set out the wrongful act which caused the injury to the plaintiff, and under the evidence that the defendant was not in possession of the banner at the time it fell the plaintiff cannot recover and the verdict must be for the defendant."

"Answer: The other points are refused."

Sixth. The Court erred in answer to the defendant's seventh point for charge, which point and answer are as follows:

"7th. Under all of the testimony in the case the defendant company was simply an employee of Skinner engaged to erect the ban-



ner in question for a compensation according to the service rendered, and that it had no other or further connection with said banner, that it did not fall while in the possession or control of the defendant, nor while in process of erection; therefore there was no such relation, contractual or otherwise, between the plaintiff and the defendant as to enable Pancoast or his representative to recover for the faulty or negligent erection of the banner even if it were so erected, and your verdict must be for the defendant."

"Answer: The other points are refused."

Seventh. The Court erred in answer to the defendant's eighth point for charge, which point and answer are as follows:

"8th. The mere fact that Vernon W. Pancoast was injured on October 12, 1912, by the falling of this banner, or by the falling of the bricks in the flue to which said banner was attached, will not make the defendant liable in this case. The testimony shows that on the day of the accident the defendant owed no duty to the plaintiff and that the defendant had not negligently omitted to do something on behalf of the defendant which the defendant was under legal obligations towards the plaintiff to do. Therefore, the plaintiff cannot recover in this action, and your verdict must be for the defendant."

"Answer: The other points are refused."

Eighth. The Court erred in answer to the defendant's ninth point for charge, which point and answer are as follows:

419 "9th. Under the Law, the Pleadings and the Evidence the plaintiff is not entitled to recover and a verdict must be for the defendant."

"Answer: The other points are refused."

Ninth. The Court erred in overruling defendant's motion for new trial and entering judgment in favor of plaintiff upon the verdict.

*Order Extending Time for Filing Printed Record.*

Now, March 18th, 1918, it appearing to the Court that the Dubois Electric Company, who has taken a writ of error in the above entitled case to the Circuit Court of Appeals of the Third District, is unable to obtain the printed record in this case and have the same filed in the Circuit Court of Appeals of said District, within thirty days, as required by rule of Court, on motion of Miller & Hartwick attorneys for the said Dubois Electric Company, the time for filing the printed record in the case is enlarged and extended to May 1st, 1918.

PER CURIAM.



*Certificate.*

WESTERN DISTRICT OF PENNSYLVANIA, ss:

I, J. Wood Clark, Clerk of the District Court of the United States for the Western District of Pennsylvania, do hereby certify that the appended and foregoing pages contain a true and correct copy of the record sur Writ of Error in the above entitled case, so full and entire that the same remains of record and on file in my office in the City of Pittsburgh, in said District.

In testimony whereof, I have hereunto signed my name and fixed the seal of the said Court, at Pittsburgh, this — day of —, A. D. 1918.

(Signed)

J. WOOD CLARK.

In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1918.

No. 2371 (List No. 2).

DUBOIS ELECTRIC COMPANY, Plaintiff in Error,

v.

FIDELITY TITLE & TRUST Co., Admr. V. W. Pancoast Est.,  
Defendant in Error.

And afterwards, to wit, on the first day of October, 1918, come the parties aforesaid by their counsel aforesaid, and this case being called for argument, sur pleadings and briefs, before the Hon. Joseph Buffington, Hon. John B. McPherson and Hon. Victor B. Woolley, Circuit Judges, and the Court not being fully advised in the premises, takes further time for the consideration thereof.

And afterwards, to wit, on the twenty-seventh day of November, 1918, come the parties aforesaid by their counsel aforesaid, and the Court now being fully advised in the premises, renders the following decision:

422 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1918.

No. 2371.

DUBOIS ELECTRIC COMPANY

vs.

PANCOAST'S ADMR.

Error to the District Court of the United States for the Western District of Pennsylvania.

Per CURIAM:

The principal facts of this case will be found in the opinion delivered on the former writ of error; 238 Fed. 129. We there decided that the only ground for holding the Electric liable for the injury to Pancoast "would be a continuing duty resting on the company so to maintain the banner that persons on the street should not be endangered." On the trial now under review some evidence was offered on this question, and the verdict must be based on a finding that the company had undertaken the duty of maintenance as well as the duty of hanging the banner and taking it down.

In our opinion, the only testimony in support of such a finding was too meager and too vague to justify the verdict, and the trial judge should therefore have given instructions in favor of the defendant.

The judgment is reversed.

Endorsed: 2371. Opinion Per Curiam. Received & Filed Nov 27, 1918. Saunders Lewis, Jr., Clerk.

423 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1918.

No. 2371 (List No. 2).

DUBOIS ELECTRIC COMPANY, Plaintiff in Error,

v.

FIDELITY TITLE & TRUST Co., Admr. V. W. Pancoast Est.,  
Defendant in Error.

In Error to the District Court of the United States for the Western District of Pennsylvania.

This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by the Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs.  
Philadelphia, Pa., November 27, 1918.

VICTOR B. WOOLLEY,  
*Circuit Judge.*

Endorsements: 2371. Order Reversing Judgment Received & Filed Nov. 27, 1918. Saunders Lewis, Jr., Clerk.

24 UNITED STATES OF AMERICA,  
*Eastern District of Pennsylvania,  
Third Judicial Circuit, et.:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be true and faithful copy of the original transcript of record and proceedings in this Court in the case of: Dubois Electric Company, Plaintiff in Error v. Fidelity Title & Trust Co., Admr. V. W. Pancoast Est., Defendant in Error on file, and now remaining among the records of the said Court, in my office.

In testimony whereof, I have hereunto subscribed my name and fixed the seal of the said Court, at Philadelphia, this 30th day of November in the year of our Lord one thousand nine hundred and eighteen and of the Independence of the United States the one hundred and forty-third.

[Seal United States Circuit Court Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,  
*Clerk of the U. S. Circuit Court of Appeals, Third Circuit.*

25 UNITED STATES OF AMERICA, et.:

[Seal of the Supreme Court of the United States.]

The President of the United States of America to the Honorable the Judges of the United States Circuit Court of Appeals for the Third Circuit, Greeting:

Being informed that there is now pending before you a suit in which The Dubois Electric Company is plaintiff in error, and Fidelity Title & Trust Company, Ancillary Administrator of the Estate of Vernon W. Pancoast, deceased, is defendant in error, which suit was removed into the said Circuit Court of Appeals by virtue of a writ of error to the District Court of the United States for the Western District of Pennsylvania, and we, being willing for certain reasons in the said cause and the record and proceedings therein should

be certified by the said Circuit Court of Appeals and removed into the Supreme Court of the United States,

426 Do hereby command you that you send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, so that the said Supreme Court may act thereon as of right and according to law ought to be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the twenty-fourth day of April, in the year of our Lord one thousand nine hundred and nineteen.

JAMES D. MAHER,

*Clerk of the Supreme Court of the United States.*

[Endorsed:] File No. 26,946. Supreme Court of the United States, No. 860, October Term, 1918. Fidelity Title & Trust Company, Ancillary Administrator etc., vs. The Dubois Electric Company. Writ of Certiorari. Received Apr. 30, 1919. Saunders Lewis, Jr., Clerk.

427 In the United States Circuit Court of Appeals for the Third Circuit, October Term, 1918.

No. 2371.

THE DUBOIS ELECTRIC COMPANY, Plaintiff in Error,

VS.

FIDELITY TITLE AND TRUST COMPANY, Ancillary Administrator of the Estate of Vernon W. Pancoast, Deceased, Defendant in Error.

*Stipulation of Counsel Respecting the Return of the Writ of Certiorari in the Above-entitled Case.*

And now, to wit, April 26th, 1919, the Supreme Court of the United States having granted on April 24, 1919, a writ of certiorari in the above entitled case commanding the Honorable Judges of the United States Circuit Court of Appeals for the Third Circuit to send without delay to the said Supreme Court, as aforesaid, the record and proceedings in said cause, it is hereby stipulated and agreed by counsel for the parties to the above entitled action that the certified transcript of the record and proceedings in said cause in the United States Circuit Court of Appeals for the Third Circuit, now on file in the Office of the Clerk of the Supreme Court of the United States with the petition for the writ of certiorari, may and shall be taken as a return by said Circuit Court of Appeals to said writ of certiorari, and that the Clerk of said Circuit Court of Appeals is hereby authorized and requested to send a certified copy of this

428 stipulation to the Supreme Court of the United States as his return to said writ.

MILLER & HARTSWICK,  
*Attorneys for the Dubois Electric Company.*  
STERRETT AND ACHESON,  
JAMES R. STERRETT,  
M. W. ACHESON, JR.  
CHARLES ALVIN JONES.  
*Attorneys for Fidelity Title and Trust Com-  
pany, Ancillary Administrator of the Estate  
of Vernon W. Pancoast, Deceased.*

[Endorsements:] No. 2371. October Term, 1918. The Dubois Electric Company, Plaintiff in Error, vs. Fidelity Title and Trust Company, Administrator of the Estate of Vernon W. Pancoast, deceased, Defendant in Error. Stipulation of Counsel Respecting the return of the writ of certiorari in the above entitled case. Received & Filed Apr. 30, 1919. Saunders Lewis, Jr., Clerk.

429-430 UNITED STATES OF AMERICA.  
*Eastern District of Pennsylvania,  
Third Judicial Circuit, act:*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby Certify the foregoing to be a true and faithful copy of the original stipulation of counsel respecting the return of the writ of certiorari in the case of: The Dubois Electric Co., Plaintiff in Error vs. Fidelity Title & Trust Co., Ancillary Administrator of the Estate of Vernon W. Pancoast, deceased, Defendant in Error, on file, and now remaining among the records of the said Court, in my office.

In testimony Whereof, I have hereunto subscribed my name and affixed the seal of the said Court, at Philadelphia, this 30th day of April in the year of our Lord one thousand nine hundred and nineteen, and of the Independence of the United States the one hundred and forty-third.

[Seal United States Circuit Court of Appeals, Third Circuit.]

SAUNDERS LEWIS, JR.,  
*Clerk of the U. S. Circuit Court of Appeals, Third Circuit.*

431 [Endorsed:] File No. 26,946. Supreme Court U. S. October Term, 1918. Term No. 860. Fidelity Title & Trust Company, Ancillary Adm'r. etc., Petitioner, vs. The Dubois Electric Company. Writ of certiorari and return. Filed May 2, 1919.

FILED

APR 11 1919

JAMES D. MAHER,  
CLERK.

IN THE  
**Supreme Court of the United States**

300  
**NO. 860 OCTOBER TERM, 1918.**

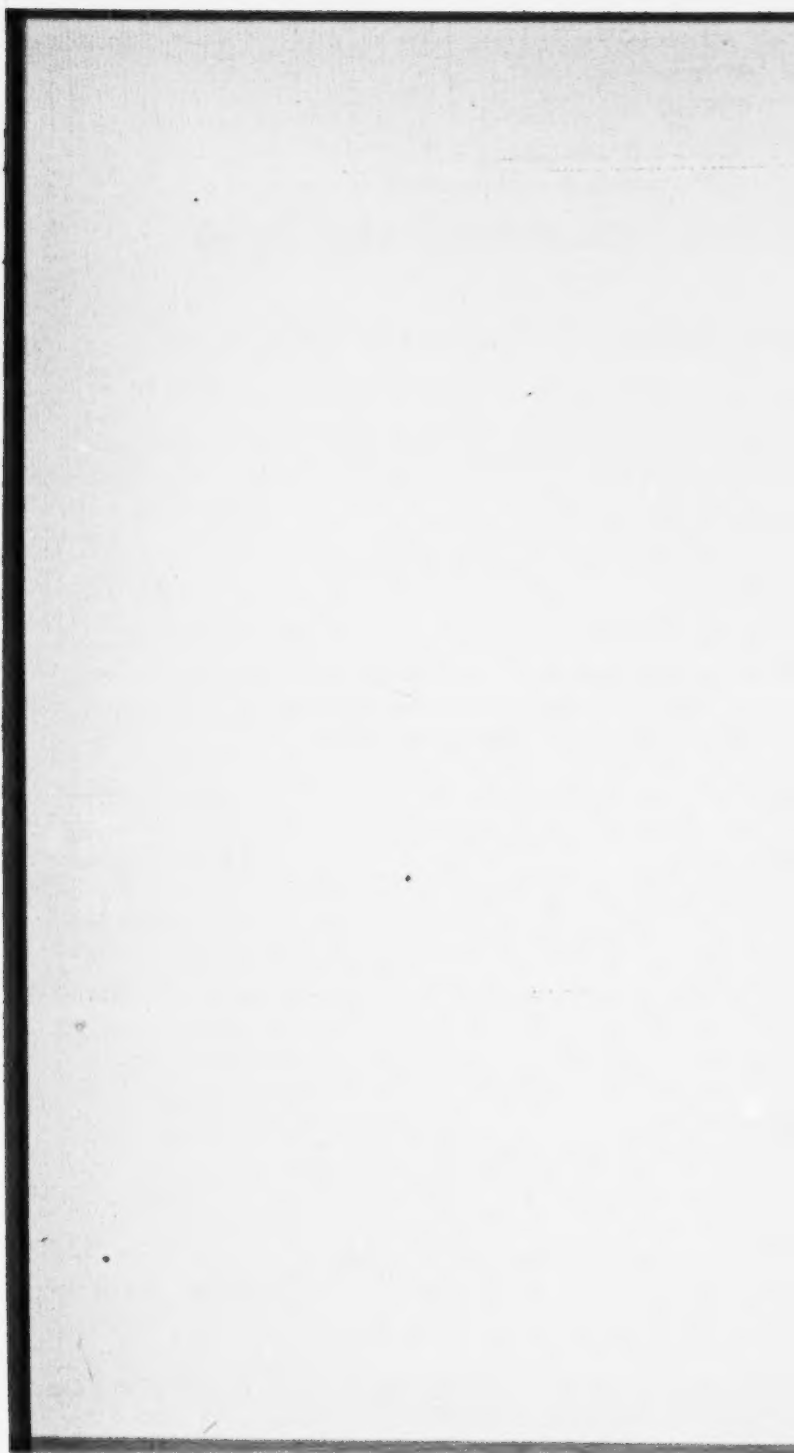
**FIDELITY TITLE AND TRUST COMPANY, Ancillary  
Administrator of the Estate of VERNON W.  
PANCOAST, Deceased, Petitioner,**

**vs.**

**THE DUBOIS ELECTRIC COMPANY,  
Respondent.**

**MOTION TO REINSTATE PETITION FOR  
WRIT OF CERTIORARI, PURSUANT  
TO ORDER OF THIS COURT OF  
MARCH 24, 1919.**

**JAMES R. STERRETT,  
M. W. ACHESON, JR.,  
CHARLES ALVIN JONES,**  
Counsel for Petitioner.





IN THE  
**Supreme Court of the United States**

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**NO. 860 OCTOBER TERM, 1918.**

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FIDELITY TITLE AND TRUST COMPANY, Ancillary  
Administrator of the Estate of VERNON W.  
PANCOAST, Deceased, Petitioner,

vs.

THE DUBOIS ELECTRIC COMPANY,  
Respondent.

---

**Motion to Reinstate Petition for Writ  
of Certiorari, Pursuant to Order of  
This Court of March 24, 1919.**

And now, April 14th, 1919, the petitioner in the above case respectfully presents herewith a certified copy of an order of the Circuit Court of Appeals for the Third Circuit, entered on March 28, 1919, in the above case, and a certified copy of an order of the District Court of the United States for the Western District of Pennsylvania, entered on April 1, 1919, in the above case, both failing to award a new trial, and now, pursuant to the order of this Court of March 24, 1919, the petitioner respectfully moves the Court to reinstate the petition for a writ of *certiorari*, and to grant the prayer of said petition.

JAMES R. STERRETT,  
M. W. ACHESON, JR.,  
CHARLES ALVIN JONES,  
*Counsel for Petitioner.*

IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT.

No. 2371 (List No. 2)

October Term, 1918.

DUBOIS ELECTRIC COMPANY,  
Plaintiff in Error,

vs.

FIDELITY TITLE & TRUST Co., Admr. V. W.  
PANCOAST ESTATE, Defendant in Error.

It appearing to this Court that its mandate had issued prior to the application to the Supreme Court of the United States for a writ of *certiorari* in the above entitled cause, it is now, upon due consideration, ordered that the said mandate be amended *nunc pro tunc* to the effect that the District Court of the United States for the Western District of Pennsylvania be and the same is hereby authorized to award a new trial if in its discretion that course is deemed proper.

Philadelphia, March 28, 1919.

JOS. BUFFINGTON,  
*Circuit Judge.*

Endorsements:

2371

Order Amending Mandate  
Received & Filed  
Mar. 28, 1919

Saunders Lewis, Jr.,  
Clerk.

*United States of America,  
Eastern District of Pennsylvania,* } *sct.*  
*Third Judicial Circuit.*

I, Saunders Lewis, Jr., Clerk of the United States Circuit Court of Appeals, for the Third Circuit, do hereby certify the foregoing to be a true and faithful copy of the original order amending mandate in the case of:

DuBois Electric Company,  
Plaintiff in Error,  
vs.

Fidelity Title & Trust Co., Admr. V. W.

Pancoast Estate, Defendant in Error,  
on file, and now remaining among the records of the said Court, in my office.

In Testimony Whereof, I have here-  
unto subscribed my name and af-  
fixed the seal of the said Court at  
Philadelphia this 31st day of  
March, in the year of our Lord one  
thousand nine hundred and nine-  
teen and of the Independence of the  
United States the one hundred and  
forty-third.

[SEAL]

SAUNDERS LEWIS, JR.,  
*Clerk of the U. S. Circuit Court of  
Appeals, Third Circuit.*

Certified from the record this 1st day of April,  
A. D. 1919.

J. WOOD CLARK,  
*Clerk.*

[SEAL]

IN THE  
DISTRICT COURT OF THE UNITED STATES  
FOR THE WESTERN DISTRICT OF PENNSYLVANIA.

FIDELITY TITLE & TRUST COM- PANY, Administrator of the Estate of V. W. PANCOAST, vs. DUBOIS ELECTRIC COMPANY.	}	No. 1234 October Term, 1914.
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**Order.**

The Circuit Court of Appeals for the Third Circuit having, on March 28th, 1919, in the above stated case made the following order:

"It appearing to this court that its mandate had issued prior to the application to the Supreme Court of the United States for a writ of *certiorari* in the above entitled cause, it is now, upon due consideration, ordered that the said mandate be amended *nunc pro tunc* to the effect that the District Court of the United States for the Western District of Pennsylvania be and the same is hereby authorized to award a new trial if in its discretion that course is deemed proper."

Now, to wit, April 1, 1919, after due consideration, the Court has concluded not to exercise the discre-

tionary power of granting a new trial, conferred upon it under and by virtue of the foregoing order of the Circuit Court of Appeals.

BY THE COURT,

W. H. S. THOMSON,

*U. S. Dist. Judge.*

Certified from the record this 1st day of April,  
A. D. 1919.

J. WOOD CLARK,

*Clerk.*

[SEAL]

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FEB 17 1919

JAMES D. NAHÉN,

CLERK.

IN THE

# Supreme Court of the United States

**No. 300**  
**OCTOBER TERM, 1918.**

**FIDELITY TITLE AND TRUST COMPANY, Ancillary Administrator of the Estate of VERNON W. PANCOAST, Deceased, Petitioner,**

**vs.**

**THE DUBOIS ELECTRIC COMPANY, Respondent.**

**Petition for Writ of Certiorari to the United States Circuit Court of Appeals for the Third Circuit, and Brief in Support Thereof.**

**JAMES R. STERRETT,  
M. W. ACHESON, JR.,  
CHARLES ALVIN JONES,**

**Counsel for Petitioner.**

**1927 Oliver Bldg.,  
Pittsburgh, Pa.**





IN THE  
**Supreme Court of the United States**

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**No. 860 OCTOBER TERM, 1918.**

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FIDELITY TITLE AND TRUST COMPANY, Ancillary Administrator of the Estate of VERNON W. PANCOAST,  
Deceased, Petitioner,

vs.

THE DUBOIS ELECTRIC COMPANY, Respondent.

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**Petition for Writ of Certiorari to the  
United States Circuit Court of Appeals  
for the Third Circuit.**

*To the Honorable, the Chief Justice and Associate  
Justices of the Supreme Court:*

The petition of Fidelity Title and Trust Company, Ancillary Administrator of the Estate of Vernon W. Pancoast, deceased, respectfully represents:

1. On the 27th day of November, 1918, the United States Circuit Court of Appeals for the Third Circuit

by a per Curiam opinion (a copy of which is hereto attached, as Exhibit "A") reversed without a venire, contrary to the rule of this Honorable Court in *Slocum vs. The Insurance Company*, 228 U. S., 364, a judgment at law for the plaintiff for personal injuries and entered the judgment herein complained of.

2. The case is a controversy between citizens of different states in an amount conferring federal jurisdiction and originated in the District Court of the United States for the Western District of Pennsylvania.

The plaintiff, before verdict, died from his injuries, leaving his widow to survive him, his personal representative, the petitioner, being then duly substituted of record as plaintiff under the Pennsylvania statute providing therefor.

3. The injuries sued for were sustained under the following circumstances:

Pancoast, as a pedestrian, being lawfully on a sidewalk of a public thoroughfare in the Borough of DuBois, Pennsylvania, without fault on his part and without warning, was struck on the head by bricks of a falling chimney.

There had been stretched aloft from building to building across the highway a large heavy political banner which on Pancoast's side of the street had been—and in a negligent manner—anchored to the chimney, and it was this banner tugging at its anchor that precipitated the chimney upon Pancoast.

The fall of this chimney was directly due to its

being used as a fastening for the banner and to the negligent mode of attachment.

4. The DuBois Electric Company (the defendant in the District Court, the plaintiff-in-error in the Circuit Court of Appeals, and the respondent now), under a contract for hire with a political committee, erected the banner, using the chimney as a fastening, tied the banner up again after the accident, and, when it had served its purpose, eventually removed it altogether.

The ensuing verdict for the plaintiff establishing the negligence of the Electric Company's use of the chimney and mode of attaching the banner, is well supported by the proofs.

5. The fundamental question in the case was whether there was evidence tending to show that the contract of employment of the Electric Company embraced the Electric Company's maintenance of the banner at the time of Pancoast's injury, which occurred between the putting up and the final taking down of it.

6. The United States Circuit Court of Appeals for the Third Circuit had already in this very case (see *DuBois Electric Company vs. Fidelity Title and Trust Company*, 238 Fed. Rep. 129, 130, and 131) laid down for these litigants the rule as to the ground of this Electric Company's liability, namely, facts to support the inference of "a continuing duty resting on the Company so to maintain the banner that persons on the street should not be endangered," and accordingly at that time that Court granted the new trial which subsequently resulted in the verdict and judgment in ques-

tion and upon which new trial, in addition to the circumstances above cited, competent testimony from a member of the political committee who had engaged the defendant's services was adduced as follows:

That the terms of the employment (which were oral) embraced "to put the banner up for me, and when the election was over to take it down, telling them I wanted nothing to do with it; I wanted them to attend to it. I didn't want to go on the roof." (R., p. 36.)

"Q. Were you ever on the roof of the hotel building?

A. No, sir.

Q. Were you to go on the roof of the hotel building?

A. No, sir.

Q. Was there anything said in your dealings with the Electric Company for the hanging of this banner, about your control of it?

A. No, sir.

Q. Were you to have control over it?

A. No, sir. (R., p. 38.)

. . . . .

"Just as I stated before, I went to the Electric Company and asked them to put up the banner and take it down after the election, stating to them that I didn't want to have anything to do with it; I wouldn't go on the roof, and wanted them to attend to it. That was my statement at the time." (R., p. 39.)

. . . . .

"After the banner had been up, I think the

first night, it came down. The next day they replaced it and that evening they reported to me that they had restrung the banner," &c. (R., p. 40.)

\* \* \* \* \*

"A. That was the report, that the banner had come down.

Q. Did you know that yourself?

A. No, sir.

Q. Did you direct them to go up there and fasten it to the chimney?

A. No, sir.

Q. Did you have any conversation with them between the time that they received the banner from you, and the cleats, and the time that they fastened it to the chimney?

A. No, sir." (R., p. 41.)

After the accident, without any word from or participation by the witness, the banner was put up again. (R., pp. 46 to 47.)

"Q. Did any one consult with you respecting the suspension of the banner, between the time of the accident and the time you saw it hung back there?

A. No, sir.

Q. Did you give any direction with respect to the restringing of the banner after the accident?

A. No, sir.

Q. Had you given any directions with respect to

the stringing of the banner, at the time when they received it from you in the Acorn Club, up until the time of the accident?

A. No, sir." (R., p. 46.)

\* \* \* \* \*

Not only was the Electric Company's putting back of the banner thus without further employment or direction, but,—

"Q. Who removed the banner finally?

A. From the poles?

Q. Yes.

A. The DuBois Electric Company." (R., pp. 46, 47.)

The Electric Company sent a bill for its entire service in respect of the banner, after it had finally taken the banner down, and this was duly paid. (R., p. 37 to p. 39.)

7. The trial was in strict accordance with the rule of the Circuit Court of Appeals which that Court, as above pointed out, had prescribed as controlling between these very parties in this very litigation, and, under a careful charge (R., p. 376 *et seq.*) by the trial judge in scrupulous conformity with that rule as laid down by the Circuit Court of Appeals, the jury found that the contract of employment did embrace the Electric Company's control of the banner at the time of the injury to Pancoast, and accordingly returned a verdict for the plaintiff in the sum of \$9400. This was a moderate amount in view of Pancoast's totally destroyed earning power, his age of forty-three, and the serious char-

acter of his injuries, particularly to his brain, and the District Court pursuant to its opinion by the Honorable W. H. S. Thomson, J., refused to disturb it, and judgment was duly entered. (R., p. 394 *et seq.*)

8. In spite of this exact compliance, as is most respectfully submitted, with the Circuit Court of Appeals' own rule in this very case, that Court subsequently in a brief per Curiam opinion reversed the judgment on the verdict for the plaintiff—and without a venire—upon the ground that while “some evidence” was offered in support of a continuing duty, the testimony, in the opinion of the Circuit Court of Appeals, was “too meager” and “too vague,”—and this without specific reference to any of the testimony taken upon the re-trial. (R. p. 422.)

9. The judgment of the United States Circuit Court of Appeals is in these words,—

“The judgment is reversed.” (R., p. 422.)

10. The petitioner relies for the allowance of the writ on the following

#### GENERAL REASONS:

(a) The United States Circuit Court of Appeals laid down a rule as to the measure of liability governing the rights and obligations of these litigants in this very action; that rule was fully met in a duly had trial at law before a jury; agree-



ably thereto under careful instructions from the trial judge that jury has found the fact that the Electric Company was employed to maintain the banner and maintained it negligently, to the serious hurt of Pancoast, a pedestrian, lawfully on a public highway of a sister state; and now the same Circuit Court of Appeals, in spite of strict compliance with its own rule for this cause, under an adequate supervision by the trial court, sets aside the ensuing finding of the fact by the jury without a *venire*; and

(b) The judgment of reversal is thus also in violation of the direction of this Honorable Court to the same United States Circuit Court of Appeals, requiring a reversal with "a direction for a new trial." (*Slocum vs. The Insurance Company*, 228 U. S., 364, 400.)

The petitioner respectfully submits that a United States Circuit Court of Appeals' reversal of a judgment upon a verdict establishing a disputed matter of fact, supported by evidence, duly adduced in compliance with that Appellate Court's own rule prescribed for the litigants in the same cause, is a case for the exercise of the authority to review which the Congress lodged with this Honorable Court in the statute creating the Circuit Courts of Appeals.

11. The petitioner furnishes as an exhibit to this petition a certified copy of the entire Transcript of Record of the case, including the proceedings in the Circuit Court of Appeals.

Wherefore the petitioner prays the Court to issue its writ of certiorari to the United States Circuit Court of Appeals for the Third Circuit to bring up this cause for review by this Honorable Court.

JAMES R. STERRETT,  
M. W. ACHESON, JR.,  
CHARLES ALVIN JONES,  
*Counsel for Petitioner.*

*Western District of Pennsylvania,* } ss.  
*County of Allegheny.*

Before the undersigned authority personally appeared Alex. B. Reed, who, being duly sworn according to law, deposes and says that he is Asst. Trust Officer of Fidelity Title and Trust Company, the Ancillary Administrator of the Estate of Vernon W. Pancoast, deceased, the petitioner, and that the matters of fact averred in the foregoing petition are true and correct, as affiant verily believes.

ALEX. B. REED.

Sworn to and subscribed before me this 14th day of February, 1919.

MARGARET CAGNEY,  
*Notary Public.*

My appointment dated Feb. 5, 1918.

My commission expires end next session of Senate.

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**Exhibit "A."**

IN THE  
UNITED STATES CIRCUIT COURT OF APPEALS  
FOR THE THIRD CIRCUIT.

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DuBois Electric Company.	}	No. 2371 October Term 1918.
vs.		
PANCOAST'S ADMR.		

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**Error to the District Court of the United  
States for the Western District  
of Pennsylvania.**

PER CURIAM.

The principal facts of this case will be found in the opinion delivered on the former writ of error; 238 Fed. 129. We there decided, that the only ground for holding the Electric Company liable for the injury to Pancoast "would be a continuing duty resting on the company so to maintain the banner that persons on the street should not be endangered." On the trial now under review some evidence was offered on this question, and the verdict must be based on a finding that the company had undertaken the duty of maintenance, as well as the duty of hanging the banner and taking it down.

In our opinion, the only testimony in support of such a finding was too meager and too vague to justify the verdict, and the trial judge should therefore have given instructions in favor of the defendant.

The judgment is reversed.

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Endorsed

2371

Opinion Per Curiam

Received and Filed

Nov. 27, 1918.

Saunders Lewis, Jr., Clerk.

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**BRIEF**

**In Support of Petition.**





IN THE  
SUPREME COURT OF THE UNITED STATES

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No. 860 October Term 1918.

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FIDELITY TITLE AND TRUST COMPANY,  
Ancillary Administrator of the Estate of  
VERNON W. PANCOAST,  
deceased, Petitioner.

vs.

THE DUBOIS ELECTRIC COMPANY,  
Respondent.

---

Sur Petition for Writ of Certiorari to the United States  
Circuit Court of Appeals for the Third Circuit.

---

**Brief on Behalf of the Petitioner.**

1.

The fact and terms of the rule of liability in this litigation laid down by the Circuit Court of Appeals for these very parties, is conceded.

That rule was promulgated in *DuBois Electric Company vs. Fidelity Title and Trust Company*, 238 Fed. 129, 131, and what was there decided is also stated by the Circuit Court of Appeals in its recent brief per Curiam reversal embodied in the judgment herein complained of (R., p. 422, and *DuBois Electric Company vs.*

*Pancoast's Administrator*, Advance Sheets, 253 Fed. Rep. 987).

The rule is thus correctly repeated by the Circuit Court of Appeals in the last opinion (R., p. 422), namely,—

"That the only ground for holding the Electric Company liable for the injury to Pancoast 'would be a continuing duty resting on the Company so to maintain the banner that persons on the street should not be endangered.' "

2.

The evidence abundantly measured up to this rule of liability thus prescribed by the Circuit Court of Appeals.

The testimony is quoted and epitomized in the petition (pp. 4 to 6, *supra*), as well as in Judge Thomson's opinion refusing a new trial (R., pp. 394 to 404).

That there was a contract of employment of the respondent in the premises of *some* scope—acted under, charged for, and paid for—was admittedly established by competent evidence (see also affidavit of defense, R., near ft. p. 28), the only possible inquiry being as to the *terms* of that employment.

It seems to us that the only justifiable *inference of fact* from the words spoken when the Electric Company

was employed, especially in the light of the Electric Company's acts during the period in question, was, that that Company had undertaken the duty of maintenance of the banner and was in control of it at the time Pan-coast was hurt.

The trial Court's leaving the inference of fact to the jury—the employment being oral and all inferences of fact being of course for the jury, as Judge Thomson shows (R. pp. 403, 404)—was the utmost the respondent could ask for,—surely the trial Court could not have charged the jury as a matter of law that under the employment the Electric Company did not have control of the banner.

And as Judge Thomson further points out (R. p. 395), the trial Court endeavored to conform strictly to the decision of the Circuit Court of Appeals, and beyond question succeeded.

Our basic position of course depends upon existence of the necessary evidence to meet the rule laid down by the Circuit Court of Appeals, but it is submitted that compliance with that rule at once appears upon a reading of the testimony cited.

### **3.**

Now, the Circuit Court of Appeals in its last opinion itself states that evidence on this basic question of liability *was* offered, but contents itself by characterizing that testimony as “meager” and as “vague,” without

quoting any of it or pointing out wherein its vagueness or meagerness consists.

More remarkable still, the Circuit Court of Appeals builds on a *prior trial*, that reported in 238 Fed. 129, as though it were the repository of the facts *instead of the trial under review*, this in spite of the fact that the attention of the Circuit Court of Appeals was directly called by Judge Thomson (R., p. 395 *et seq.*) to the fact that the evidence now under review is different.

The Electric Company's liability also clearly appears from the evidence, not only under the rule of liability as thus prescribed by the Circuit Court of Appeals, but from the well settled authorities generally.

For example, in *Gray vs. Light Company*, 114 Mass. 149, an owner, whose chimney without his consent had been made unsafe by a gas company's affixing a wire to it so that the chimney fell upon a passerby, was allowed to recover from the Company for the damages which he had thus to pay.

So, had there been a recovery here against the owner of the hotel, he would have had an action over against the respondent. Thus in *Scullin vs. Dolan*, 4 Daly's Rep. 163, where a piece of the roping of a chimney fell and injured a pedestrian on the sidewalk, the Court exculpated the landowner, because the injury arose from the negligent, unauthorized use of the chimney by a third party. And in the case at bar, the political committee made no arrangement with the landowners (R., ft. p. 41.)

Where the work is turned over in a manner so negligently defective as to be imminently dangerous to third persons, the contractor continues liable. *Young vs. Smith and Kelly Company*, 4 Am. & Eng. Ann. Cases, 226.

In *Pennsylvania Steel Company vs. The Contracting Company*, 175 Fed. 176, 180, the Court said that it was immaterial that the dangerous thing made and turned over for use by others is a structure, instead of an article of commerce such as a drug.

In *Snare and Tricst Company vs. Friedman*, 169 Fed. 1, a recovery was had against an independent contractor who piled iron beams dangerously on a public sidewalk.

Pancoast's injuries were the natural and direct result of the Electric Company's negligent act performed in relation to a subject matter over which it had control at the time.

#### 4.

It seems to us that it cannot be, that a Circuit Court of Appeals may prescribe for parties in specific litigation a rule of liability and may then arbitrarily disregard compliance with its own rule.

We most earnestly disclaim any intention to treat the Circuit Court of Appeals with other than the greatest respect, but the duty to the client, as we see it, bids that we submit, as we most respectfully do, that the

action of the Circuit Court of Appeals was an abuse of discretion.

If we are right in our premises—and *there* is the testimony, there is the rule of the Circuit Court of Appeals, there is its per Curiam reversal without a venire—then surely we present a case for the exercise by this Court of its power of review.

Uniformity of decision *between* Courts of Appeals, (*Forsyth vs. Hammond*, 166 U. S., 506, ft. 514), spells a certiorari, why not uniformity in the same Court of Appeals itself in one and the same cause?

If as in *American Construction Company vs. Jacksonville Railway*, 148 U. S., 372, a judge's sitting in the Circuit Court of Appeals on a case in which he had taken part in the Circuit Court, justified the writ, why not where the Circuit Court of Appeals sets aside a verdict duly recovered in strict compliance with its own rule of liability laid down for the very parties in the very cause?

In *St. Louis, etc. R. R. Co. vs. Wabash R. R. Co.*, 217 U. S., 247, 251, the construction of a prior decree of a United States Circuit Court affirmed by this Court was one of the reasons for the grant of the writ, why not the more reason where a Circuit Court of Appeals arbitrarily disregards its own prior decision between the same parties?

After all, is this not eminently a case of "peculiar gravity and general importance"? *American Construc-*

*tion Company vs. Jacksonville, etc. Railway Company, supra, 383.*

A certiorari is appropriate in the case at bar. The federal jurisdiction is dependent entirely upon diversity of citizenship and the judgment of the Circuit Court of Appeals under the statute creating that Court is therefore final, and hence the case is expressly within the exception investing this Court with jurisdiction to review.

5.

Also, the reversal without a venire (R., pp. 422, 423) is in the teeth of this Court's direction to the same Circuit Court of Appeals in *Slocum vs. The Insurance Company*, 228 U. S. 364, 400, which reached this Court by certiorari by special allowance (217 U. S., 603 and p. 369 of 228 U. S.).

As this Court said in the *Slocum* case, (p. 399 of 228 U. S.), the right to a new trial is a matter of substance, for it gives opportunity "to present evidence which may not have been available or known before and also to expose any error or untruth in the opposing evidence," which was the very thing this petitioner did at the last trial and which, it is respectfully submitted, the complained of judgment undisturbed would indubitably nullify.



6.

The case in 218 Fed. 60, cited by the Circuit Court of Appeals at page 131 in its decision in 238 Fed. (the latter now cited in the present case, R. 422) was a suit which the Electric Company's former counsel brought *for Pancoast* against the municipality. Compare the appearance for Pancoast at page 61 of 218 Fed. with the appearance for the Electric Company at page 129 of 238 Fed. and notice that it was the Electric Company's counsel that brought Pancoast's unfounded suit against the municipality which the Circuit Court of Appeals properly reversed, *but that unfounded litigation has never been a reason for denying justice to Pancoast or his estate against the real tort feasor.*

Respectfully submitted,

JAMES R. STERRETT,  
M. W. ACHESON, JR.,  
CHARLES ALVIN JONES,  
*Counsel for Petitioner.*

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FILED

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JAMES D. MAHER,  
CLERK

# Supreme Court of the United States

OCTOBER TERM, 1919.

No. 300

FIDELITY TITLE AND TRUST COMPANY, Ancillary Administrator of the Estate of VERNON W. PANCOAST, deceased, Petitioner,

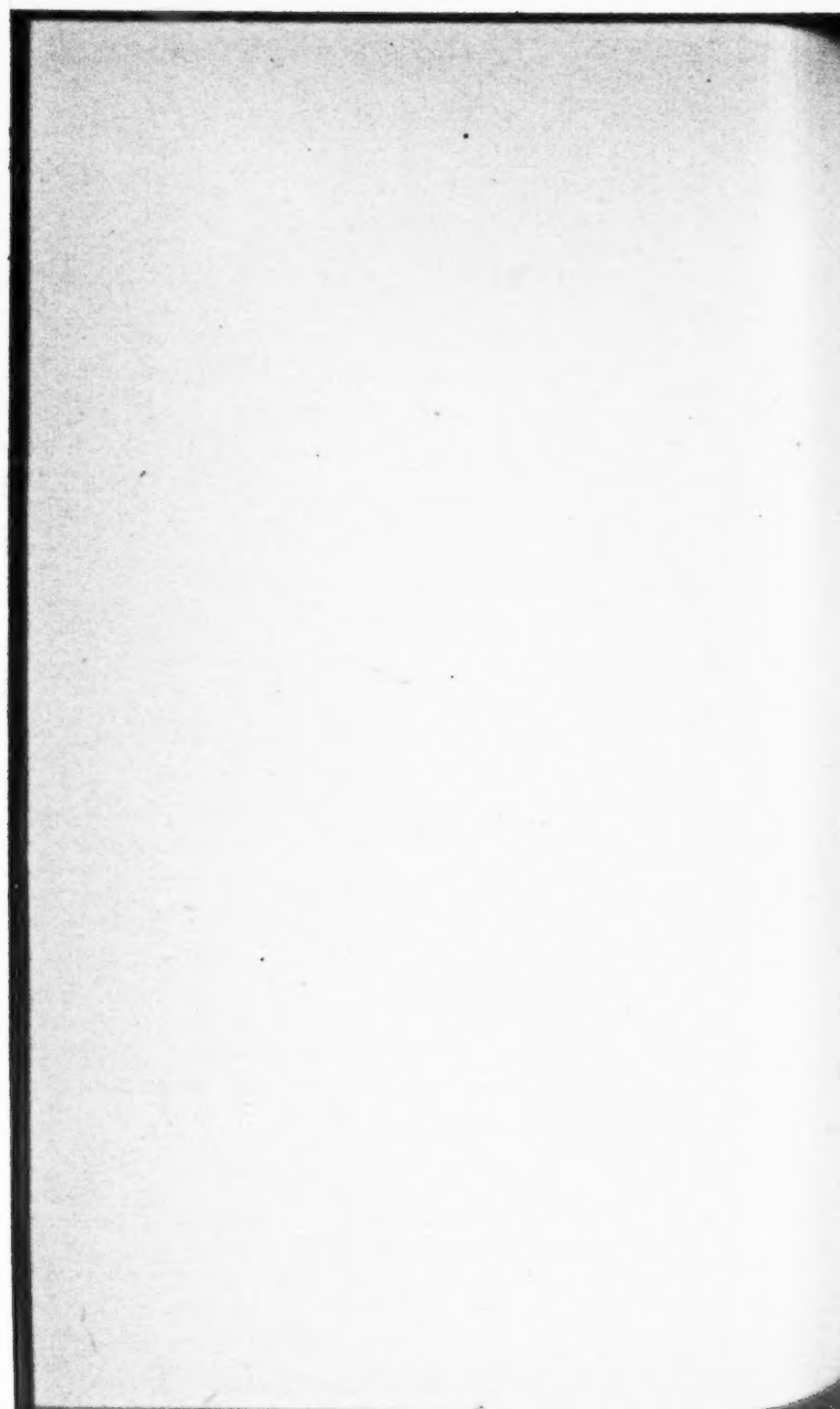
vs.

THE DuBOIS ELECTRIC COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF PLAINTIFF,  
THE PETITIONER.

ALLEN J. HASTINGS,  
Olean, New York,  
JAMES R. STERRETT,  
M. W. ACHESON, JR.,  
CHARLES ALVIN JONES,  
1927 Oliver Building, Pittsburgh,  
Attorneys for Plaintiff.



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# Supreme Court of the United States

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OCTOBER TERM, 1919.

No. 300

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FIDELITY TITLE AND TRUST COMPANY, Ancillary Administrator of the Estate of VERNON W. PANCOAST,  
deceased, Petitioner,

vs.

THE DuBOIS ELECTRIC COMPANY.

---

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE THIRD CIRCUIT.

---

## **Brief on Behalf of Plaintiff, the Petitioner.**

The record which this writ of *certiorari* to the United States Circuit Court of Appeals for the Third Circuit brings up for review, discloses, that on November 27, 1918, that Court reversed, and without a venire, a judgment at law of the District Court of the United States for the Western District of Pennsylvania upon a verdict for \$9,400.00 in favor of the present plaintiff,

the petitioner, for personal injuries to the deceased plaintiff, Vernon W. Pancoast, due to the negligence of the defendant.

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### **Statement of the Case.**

This suit was instituted in the District Court by Vernon W. Pancoast, a citizen and resident of the State of New York, against The Dubois Electric Company, a corporation of the State of Pennsylvania, resident in the Western District thereof, to recover damages for injuries received by Pancoast due to the defendant's negligence.

After bringing the suit, Pancoast died, and thereafter his personal representative (the petitioner) was substituted of record as plaintiff, for the purpose of prosecuting the action, under the statute of Pennsylvania in such case made and provided, (Sec. 18 of Act of April 15, 1851, Pamphlet Laws page 674; 3 Stewart's Purdon's Digest, p. 3238.)

At the trial contained in the record here for review, testimony in support of the plaintiff's action was adduced in substance as follows:

On the afternoon of October 12, 1912, Pancoast, while lawfully on the sidewalk of a public thoroughfare in DuBois, Pennsylvania, was suddenly, and without warning, struck on the head by falling bricks from a chimney on the roof of a four story hotel abutting on the thoroughfare at that point.

The falling of the bricks was due to the pulling over of the chimney by the strain and tugging of a large mesh and canvass banner, twenty-four feet wide, fifteen feet deep, and weighing some thirty-five pounds, one upper corner of which had been made fast to the chimney.

The use of this chimney as an anchorage for the banner was the work of The DuBois Electric Company, the defendant, under a parol contract of employment with a political committee, calling for the services of the Electric Company in respect of a temporary suspension of the banner. Along with the banner turned over to the Electric Company were two iron cleats to be screwed to buildings on either side of the street and through the eyes of which when made fast was to be tied the rope to which the top of the banner was attached when originally given into the Electric Company's charge.

The Electric Company suspended the banner on October 6, 1912, by tying it to the cleats furnished for such purpose, fastening one cleat to the roof of the Commercial Hotel and the other to a bank building on the opposite side of the street. That night, the rope tied to the cleats broke on the hotel side at or near the edge of the roof. The next day the Electric Company, without instructions or directions from anybody, procured a galvanized cable three-eighths of an inch thick and, attaching the banner to it instead of to the rope, again suspended the banner across the street, making it fast

this time on the hotel side by wrapping the galvanized cable twice round the chimney and clamping it tightly together.

The chimney was of ordinary brick and mortar construction, some three and a half feet in height, twenty-one inches square at its base, with a flared or cornice top, on which rested a cement or stone cap on four brick corner posts. The chimney stood back from the edge of the roof about thirty-one inches. The roof was almost level, sloping slightly downward as it ran back from the street. The chimney was flashed around its base, to keep out the water, with tin from the roof turned up around it and inserted into a mortar joint in the chimney about two or three brick courses above the roof. The flashing was plainly visible and its effect on the mortar joint into which it was thus inserted was to weaken the chimney greatly for a lateral strain.

The defendant actually attached the banner to the chimney by first making the galvanized cable supporting the banner fast to the bank building on the opposite side of the street. The cable was then pulled across the street to the roof of the hotel, drawn tight by hand, wrapped twice round the chimney from four to six brick courses *above the flashing*, and was then drawn taut by block and tackle. When thus tightened on the chimney, the end and the body of the cable were clamped together. Each of the lower corners of the banner was attached below to the building on its respective side of the street.

After the chimney had pulled over, the clamped double loop in the cable made by the wrapping around the chimney was found intact down by the side of the hotel, showing that the cable had not fallen independently of the chimney and that the part of the chimney used for the fastening was the part pulled over.

After the pulling over of the chimney, the banner was restrung without word or direction from the political committee or the member who had employed the defendant's services, and following the election on November 5, 1912, the Electric Company went and took the banner down permanently, and thereafter rendered a bill (for its entire services in respect of the banner) to the member of the political committee who had engaged its services, which bill he duly paid.

In addition to the testimony as to the defendant's negligent method of fastening the banner to the chimney above the flashing, its acts of control over the banner during the time of its suspension, and the nondelivery by the defendant of control over the suspended banner to anyone at any time—the plaintiff adduced testimony that the parol contract between the defendant and the political committee for the defendant's services in respect of the banner, called for those services *throughout the period of the intended temporary suspension*, and this embraced the time of the injury to Pancoast.

Pancoast at the time of the injury was forty-three years old, married, and a man of good health and habits. By reason of his injuries, inflicted by the falling bricks, he suffered a definite loss, both

of earnings and earning power, was subjected to large expenses for surgical, medical and nursing services, and endured great pain and suffering, as well as permanent mental impairment and physical inconvenience.

The defendant admitted that it suspended the banner (Affidavit of Defense, P. R., p. 14), but denied that it had done so in a negligent way, and further sought to escape liability for negligence in its use of the chimney, on the ground that its undertaking did not contemplate its services throughout the period of the banner's suspension, and that prior to the injury to Pancoast it had, as it claimed, ceded control over the banner to the member of the political committee who had engaged its services. These alleged defenses were based on testimony, *all of which was oral and all of which was in dispute.*

The trial Judge submitted the case to the jury in a charge (P. R., pp. 196 to 202) fairly presenting, *inter alia*, the defendant's contentions and their related facts, which, as already noted, appeared only by oral testimony.

The jury returned a verdict in favor of the plaintiff in the sum of \$9400.

The defendant made a motion for a new trial, which after argument the trial Court dismissed, entering judgment on the verdict for the plaintiff.

From this judgment the defendant appealed to the Circuit Court of Appeals and there contended, in addition to the question of control, that an amended statement of claim which had been filed by the plaintiff on April 27, 1916, under a new Practice Act of Pennsylvania effective January 1, 1916, had introduced a new cause of action barred by the statute of limitations. This amended statement set forth the cause of action virtually in the identical words averred in the original statement.

The Circuit Court of Appeals did not sustain the defendant's contention based on the statute of limitations, but in a brief per curiam opinion (P. R., p. 222) ruled that the testimony offered by the plaintiff was "too meager" and "too vague" to support the finding by the jury of the defendant's control over the negligently suspended banner at the time Pancoast was hurt, and that the trial Court should have given binding instructions for the defendant, and made an order reversing the judgment without directing a new trial.

The Circuit Court of Appeals having been given an opportunity by this Court to correct its order of reversal (249 U. S. 606), and not having done so, this writ was awarded (249 U. S. 597).



**Questions Presented.**

(1) Did the United States Circuit Court of Appeals for the Third Circuit err in reversing the judgment for the plaintiff without directing a new trial?

(2) Did that Court err in adjudging the testimony adduced by the plaintiff insufficient to support the finding by the jury of the defendant's control over its own negligent work at the time of the injury to Pancoast, and in ruling that the trial Court should, therefore, have directed a verdict for the defendant?

---

**Specifications of Error.**

I. The United States Circuit Court of Appeals for the Third Circuit erred in making the following order:

"This cause came on to be heard on the transcript of record from the District Court of the United States, for the Western District of Pennsylvania, and was argued by counsel.

On consideration whereof, it is now here ordered and adjudged by this Court, that the judgment of the said District Court in this cause be, and the same is hereby reversed, with costs." (P. R., pp. 222, 223.)

II. The United States Circuit Court of Appeals for the Third Circuit erred in not affirming the judgment entered by the District Court of the United States for the Western District of Pennsylvania.

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## ARGUMENT.

### I.

#### **The Judgment of Reversal Without a Direction for a New Trial Was Error.**

(1) It was in direct violation of the rulings of this Honorable Court: *Slocum vs. Insurance Company*, 228 U. S., 364; *Pedersen vs. D. L. & W. R. Co.*, 229 U. S., 146, 153; *Myers vs. Pittsburgh Coal Co.*, 233 U. S., 184, 189.

(2) It even violated the practice erroneously relied upon for its authority.

Under the Pennsylvania Statutory Practice, a motion for judgment n. o. v. (filed with the trial Court after verdict and within the four days allowed for a motion for a new trial) and an exception thereafter to the trial Court's action on such motion, are prerequisites to any exercise of power of reversal by an Appellate Court. It is the trial Court's action on the motion for judgment n. o. v., properly excepted to and assigned for error, that may serve as basis for an order of reversal: *Philadelphia vs. Bilyeu*, 36 Pa. Super Ct., 562, 565; *Chatham National Bank vs. Gardner*, 31 Pa. Super. Ct., 135, 143.

Here, there was neither motion, exception, nor assignment of error.

It clearly appearing, then, that any reversal should have been with a new trial, the question properly arises,—

Does the testimony justify a reversal at all?

The question of the defendant's *negligence* may be eliminated. It was not raised by any assignment of error in the Court of Appeals nor mentioned by that Court, and it was found against the defendant by a verdict "based upon evidence so strong and convincing that there was scarcely any escape from it," as rightly said by the trial Judge on the defendant's motion for a new trial (P. R., page 208).

*The question of control* was likewise for the jury,—

## II.

### **The Evidence Fully Justified the Jury in Finding the Defendant Still in Control at the Time Pancoast Was Hurt.**

The Circuit Court of Appeals in its opinion (P. R. p. 222), filed with its order of reversal, builds *on a prior trial*, that reported in 238 Fed. Rep. 129, treating it as the repository of the evidence resulting in the judgment appealed from, *instead of the record then under review*.

This opinion itself on the former appeal in 238 Fed. Rep., 129, contains a number of inferences of fact at variance with the testimony then under review (as well

as that now under review) adduced by the plaintiff, and contains still other inferences arrived at only by treating as verity oral testimony of interested witnesses for the defendant (the credibility of everyone of whom was for the jury) as to the scope of the defendant's employment in respect of the banner.

But, however that may be, *that was a former record*, improperly relied upon by the Circuit Court of Appeals in the case at bar. It had remanded the case for a new trial, and at the ensuing retrial in the District Court, contained in the record now under review, the plaintiff proved that the defendant's parol undertaking called for its services in respect of the banner throughout its entire suspension.

(1)

M. O. Skinner, the member of the political committee who had engaged the defendant's services, testified to the terms of its undertaking as follows:

"I went to the DuBois Electric Company and asked them to put the banner up for me and when the election was over to take it down, telling them I wanted nothing to do with it. I wanted them to attend to it. I didn't want to go on the roof."  
(P. R., p. 18.)

"Q. Were you ever on the roof of the hotel building?

A. No, sir.

Q. Were you to go on the roof of the hotel building?

A. No, sir.

Q. Was there anything said in your dealings with the Electric Company for the hanging of this banner about your control of it?

A. No, sir.

Q. Were you to have control over it?

A. No, sir." (P. R., p. 19.)

\* \* \* \* \*

"Just as I stated before, I went to the Electric Company and asked them to put up the banner and take it down after the election, stating to them that I didn't want to have anything to do with it; I wouldn't go on the roof and wanted them to attend to it. That was my statement at the time." (P. R., p. 20.)

What Skinner says in cross-examination, as for example, at page 25 and again on page 27, is all to the same effect.

By virtue of this oral engagement, unchanged and unaltered in any respect, the defendant entered upon its work in connection with the banner.

What services was the defendant company to perform under its arrangement with Skinner? What were the terms of the parol contract, and what did those terms imply? These questions, we respectfully submit, were questions for the jury.

In *Philadelphia vs. Stewart*, 201 Pa., 526, it was held that the construction of an oral agreement is for the jury, and at page 530, Judge Dean said,—

"What the parties said and *what they meant by what they said* was for the jury to answer."  
(Italics are ours.)

As Judge Gibson said in *M'Farland vs. Newman*, 9 Watts (Pa.), 55, 59,—

"The construction of an oral agreement belongs to the jury."

And again in *Sidwell vs. Evans*, 1 Penrose (Pa.), 383, 386,—

"The construction of *written* evidence is for the *court* and of *parol* evidence for the *jury*."  
(Italics are ours.)

Pertinent authorities, surely, touching a Pennsylvania contract.

We respectfully submit that the *meaning* to be attributed under the circumstances to the words, "I wanted nothing to do with it. I wanted them to attend to it. I didn't want to go on the roof. \* \* \* I asked them to put up the banner and take it down and look after it; I didn't want to have anything to do with it," (P. R., p. 18 to p. 36) especially in connection with the defendant's acts of control between the putting up and final taking down, was a matter of fact and not a matter of law. In other words, it was an inference of fact, and, therefore, exclusively for the jury.

From an examination of the charge of the trial Court, it will be seen that the jury was clearly and adequately instructed in strict accordance with the

Circuit Court of Appeals' own former rulings in this case (P. R., pp. 198 to 200; 208), and that it was with entire fairness left to the jury to say what the terms of this controverted oral contract in fact were.

But more than the parol contract of employment under which the defendant acted in respect of the banner, are the acts of control which the defendant performed throughout the banner's suspension, unbidden by anyone, save for the original engagement,—

(2)

The defendant company made the original fastening on October 6th, by tying the banner to the cleats after making them fast to the roof.

The defendant returned a second day, unrequested and undirected by anybody, after the rope supporting the banner had broken, and made the complained-of negligent fastening to the chimney—above the flashing.

As to this, Skinner testified as follows:

"After the banner had been up, I think the first night, it came down. The next day they replaced it and that evening they reported to me that they had restrung the banner," etc. (P. R., p. 20.)

\* \* \* \* \*

"A. That was the report, that the banner had come down.

Q. Did you know that yourself?

A. No, sir.



Q. Did you direct them to go up there and fasten it to the chimney?

A. No, sir.

Q. Did you have any conversation with them between the time that they received the banner from you, and the cleats, and the time that they fastened it to the chimney?

A. No, sir." (P. R., pp. 20, 21.)

After the accident, without any word or participation by Skinner, the banner was put up again. (P. R., p. 23.)

"Q. Did anyone consult you respecting the suspension of the banner, between the time of the accident and the time you saw it hung back there?

A. No, sir.

Q. Did you give any directions with respect to the restringing of the banner after the accident?

A. No, sir.

Q. Had you given any directions with respect to the strinking of the banner, at the time when they received it from you in the Acorn Club, up until the time of the accident?

A. No, sir." (P. R., p. 23.)

It was the defendant that took the banner down permanently at the end of its suspension just as originally agreed upon.

"Q. Who removed the banner finally?

A. From the poles?

Q. Yes?

A. The DuBois Electric Company.

Q. When?

A. I couldn't state just what time.

Q. How long after the accident?

A. It was right after the election." (P. R., p. 23.)

This was likewise without direction from Skinner, except for the original engagement. (P. R., p. 23.) Skinner, some days *after* the injury to Pancoast, without discharging the defendant from its undertaking "to attend to it," had requested the defendant company to remove the banner to a new location entirely (P. R., p. 23), where it used the poles the witness speaks of.

Several weeks after the defendant had finally taken the banner down, it rendered Skinner a bill for the whole of its services in respect of the banner from the time it first put it up until and including the final taking down, which bill Skinner paid. (P. R., p. 19.)

Is not the putting back of the banner by the defendant after it first came down very significant? The defendant did so upon its own initiative. Here is persuasive evidence in favor of the inferences which the jury drew from the words of employment as to the meaning and scope thereof. We have the parties' own interpretation of their undertaking. If the defendant's undertaking had merely been to put the banner up, by what right or requirement did it return the succeeding day and make an entirely different fastening of the banner? If its control after having originally suspended the banner extended into the second day, why did it not extend into the sixth—the day that Pancoast was hurt? If it was thus under obligation to return to the fastening on the roof and clamp the banner to

the chimney, why not also to go and correct its own negligent work? Such, indeed, was the defendant's duty under the terms of its employment, and the defendant by its actions clearly shows that it so understood its relation to the matter.

The parties' own interpretation of their contract is entitled to great, if not controlling, weight: *Topliff vs. Topliff*, 122 U. S., 121, 131; *Gillespie vs. Iseman*, 210 Pa., 1, 5; *Kendall vs. Klapperthal Co.*, 202 Pa., 596, 609.

Moreover, from the time of fastening the banner to the chimney, the defendant had a property right in it. It owned and provided the galvanized cable, which was to remain its property. (P. R., p. 24.)

In the light of the testimony, then, it seems to us that the evidence clearly justified the inference which the jury drew that the terms and scope of the defendant's employment, and the defendant's actions thereunder, implied its control, or supervision, over the banner during the entire period commencing with the original suspension and ending with the taking of it down.

(3)

Even if the inference of fact contended for by the defendant—that it was merely to put the banner up and take it down without responsibility therefor in the meantime—were fairly deducible, although we think it is not, it is surely not the only inference, and, therefore, it would have been error for the trial Court to instruct

the jury in favor of the defendant's interpretation, or, in other words, to have directed a verdict for the defendant.

It is only where oral evidence is of a kind "that different inferences cannot be drawn from it" that it is the Court's duty to take the question from the jury. *Insurance Company vs. Johnston*, 105 Fed., 286, 292.

In *Corset Co. vs. Simon*, 129 Fed., 144, 146, where the Court withdrew the meaning of the contract from the jury, it was because a verdict to the contrary would have been not only unsupported by testimony, but also unsupported by "legitimate inference from any fact in evidence."

In *Elliott vs. Wanamaker*, 155 Pa., 67, 74, cited by the defendant in the Circuit Court of Appeals, the Court there directed a verdict against the plaintiff because it accepted the plaintiff's own interpretation of the contract. This was without departure from the rule as to the jury's province to interpret parol contracts.

We confidently submit that the trial Court could not validly have charged the jury that, as a matter of law, under the contract of employment the defendant company had neither control nor supervision of the banner at the time of the injury to Pancoast, and we further submit that the fair and ordinary interpretation of the words used by the parties implied control by the defendant and that as confirmed by the defendant's acts of control during the suspension of the banner the jury would have gone counter to the facts and fair inferences

in the case, had they found differently than they did. Certainly, as it seems to us, the jury's finding cannot be adjudged inadmissible under the testimony in this case.

(4)

Moreover, the control contemplated by the terms of the employment is not alone determinative of the defendant's liability for its negligent work. A complete delivery by the defendant company to the political committee before the injury to Pancoast was equally vital to the defendant's theory of non-liability. This was unproven, certainly, not proven beyond dispute.

In *Curtin vs. Somerset*, 140 Pa., 70, relied upon by the defendant company, and in similar cases, where the Court was able to say *as a matter of law* that the contractor was not in control at the time of the complained of injury, not only were the terms of the contract of employment undisputed, but delivery of the work by the contractor to the owner and acceptance thereof by the owner were likewise not in dispute.

In the case at bar, the control, indisputably attaching to the defendant company by reason of its initial work on the banner, continued throughout the work performed thereafter on its own initiative.

When did the defendant terminate its control?

It failed to prove a delivery to the political committee of any completed work in respect of the banner at any time, either before or after the injury to Pan-

coast, until, indeed, it sent its bill for its entire services in respect of the banner several weeks after taking the banner down permanently, which of course was long after the injury.

The only testimony offered by the defendant on the question of delivery was the testimony of H. B. Johnson, one of the workmen for the defendant company, who testified as follows:

“Q. After fastening this cable around the flue, state whether or not you made any report of your work to M. O. Skinner?

A. Yes, sir.

Q. When was that?

A. In the evening after supper, I think it was.

Q. Where did you see Mr. Skinner?

A. On Long Avenue; West Long Avenue.

Q. What did you tell him with reference to this work?

A. I told him where we had fastened, around the flashing, at the bottom of the flue.” (P. R., pp. 162, 163.)

(Disinterested witnesses said it was *above the flashing. Infra.*)

It clearly appears from the cross-examination of this witness, Johnson, that his meeting with Skinner was purely casual and that he had neither been authorized nor directed by his employer, the defendant company, to seek out Skinner and report to him on the banner work as completed:

"Q. How did you come to meet Mr. Skinner on Long Avenue?

A. I was walking down Long Avenue, and Mr. Skinner was going in the opposite direction.

Q. Who told you to see Mr. Skinner?

A. No one.

Q. Had Mr. Skinner ever talked to you about it before?

A. No, sir; not to my knowledge.

Q. Your son was the one that came to get you to go up on the roof the day you fastened it to the chimney?

A. Yes, sir.

Q. Where were you going at the time you met Mr. Skinner?

A. I don't remember. I was just walking on the street, I think.

Q. You were not going to see Mr. Skinner?

A. No, sir.

Q. You just happened to meet him on the street?

A. Yes, sir.

Q. Was it near where the banner was suspended?

A. Yes.

Q. And you told him the banner was fastened to the chimney?

A. Yes." (P. R., p. 163.)

\* \* \* \* \*

"Q. You told Mr. Skinner that you had fastened it around the flashing of the chimney, didn't you?

A. Yes, sir." (P. R., p. 163.)



As to the point on the chimney where the cable was fastened, Johnson is contradicted by four disinterested witnesses for the plaintiff. (Oldnow; P. R., p. 39; Taylor; P. R., p. 45; Breon; P. R., p. 51; and J. F. Sober; P. R., p. 62.) So that even had Johnson been charged by his employer, as he was not, to make a formal delivery of the suspended banner to Skinner, would not his material disclosures in respect thereof have had to be true?

Skinner was never to go upon the roof, and the defendant company knew this.

No termination of control evidenced by a delivery was ever authorized, intended or made.

The control attaching to the defendant by reason of its admitted work on the banner—even assuming the truth of defendant's own version of its undertaking and ignoring the plaintiff's testimony—was on the very day of the injury to Pancoast just as unterminated by delivery, as it was on the day the defendant, unrequested by Skinner, returned to the roof and clamped the banner to the chimney.

(5)

Under circumstances such as are presented by the testimony now under consideration, the applicability of the rule relieving an independent contractor from liability for injuries to third persons depends on further questions of fact, even where there has been a delivery of his negligent work.

Did the independent contractor continue in a position with respect to his negligent work whereby he might have corrected it at any time prior to an injury to a third person, and, if so, did he fail to correct it?

The rationale of the rule in relief of an independent contractor from liability to third persons when out of control of his negligent work, is that he can no longer do anything to correct it without laying himself open to an action of trespass at the hands of the persons for whom he did the work: *Smith vs. Elliott*, 9 Pa., 345, 347. That was the case of an injury flowing from a nuisance, but the reason put forth in relief of the independent contractor's liability, when out of control, is the same.

Unless the right to make changes in the work (embracing the correction of negligence) rests *exclusively* in a deliverer, the reason for the rule in relief of the independent contractor fails. Why, then, should he not remain liable? He is the perpetrator of the wrong, and, if he may correct it, the duty to do so rests more heavily on him than on anyone else.

The law is never solicitous about relieving a tortfeasor from the natural and probable consequences of his own wrongdoing. It is only where it would be to impose a liability on him against which he thereafter has no power to relieve.

In the case under review, the defendant company's right to go upon the hotel roof was the same up until the chimney pulled over and hurt Pancoast as it was upon the days when it went upon the roof and made its

various fastenings. The consent of the landlord to the defendant company's going upon the roof, in so far as any consent was obtained at all, was, and was intended to be, obtained by the defendant company. (P. R., pp. 21, 56, 57.) In fact, the defendant company's employees who made the banner fastenings were upon the roof, right at the chimney, the morning of the very day that the chimney pulled over. They were stringing lights to illuminate the banner, which, although a matter of separate employment, was all in connection with the same general undertaking, at least so far as the defendant's *right* to go to the place of the banner fastening is concerned. It was the defendant company's right, as well as its duty, to go to the place of its negligent work any time up to the time Pancoast was hurt.

It was likewise the defendant company's right and duty to make a change in its negligent work when at the chimney.

The defendant not only had Skinner's consent, but it had a specific duty to keep the banner in a safe condition. It was the defendant company who was "to attend to it." Skinner was "to have nothing to do with it." And had the defendant company not already changed the banner fastening a few days before without asking Skinner anything about it?

In fact, an inference might properly be drawn that the defendant company had actually made a change in the cable fastening on the chimney the very day that the chimney pulled over. The defendant's witness, Johnson, says (P. R., p. 146) that he fastened the cable

around the flashing at the base of the chimney and that that was where it was at the time he went there on October 12th (the day of the injury) to string the lights. This testimony is controverted by four disinterested witnesses for the plaintiff, as hereinabove cited, but, assuming that the jury chose to believe Johnson's story, how did the cable (between the time he went there to string the lights and that afternoon) get up around the chimney above the flashing, where it undoubtedly was when the chimney pulled over? The jury might have inferred that the defendant not only had control over the banner but actually made a change in the fastening to the chimney the very day Pancoast was hurt. If, as Johnson's testimony shows, the fastening was changed the day they strung the lights, who did it? Why not the defendant's employees? They were the ones who saw fit to make use of the chimney in the first instance? Might it not have been to change the position of the banner a little with respect to the lights? Might not the defendant's employees have that day changed the position of the banner fastening, if it was changed as Johnson implies?

(6)

It never lay in the defendant's mouth to contend in its own relief that its presence on the hotel roof was without authority. The facts are these:

Skinner made no arrangement with the property owners (P. R., p. 21) but left to the defendant the whole matter of the banner suspension, with its attendant detail. The defendant's employees, charged with the work, went to the hotel to suspend the banner and,

upon being challenged by the clerk, in the landlord's absence from town, as to their right to make use of the hotel for the banner suspension, they assumed the landlord's consent by saying they would be responsible, and went ahead. (P. R., pp. 56, 57.) It was the defendant's business they were about, fully charged with respect thereto.

And even could the defendant set up its own acts as amounting to a trespass against the land owner, it would still have been the one ultimately liable for the wrong done Pancoast.

In *Gray vs. Light Company*, 114 Mass., 149, an owner whose chimney, without his consent, had been made unsafe by a gas company's affixing a wire to it so that the chimney fell upon a passerby, was allowed to recover from the gas company for the damages which he had thus to pay.

In *Scullin vs. Dolan*, 4 Daly's (N. Y.) Rep., 163, where a piece of the coping of a chimney fell and injured a pedestrian on the sidewalk, the Court exculpated the land owner because the injury arose from the negligent, unauthorized use of the chimney by a third party.

(7)

To extend the rule relieving an independent contractor as contended for by the defendant where the contractor remains in a position to correct his wrong prior to an injury therefrom would be to carry it to an unjustifiable limit.

Where the contractor's negligent work is *imminently dangerous* or amounts to a nuisance, the rule is inapplicable entirely.

The contractor continues liable, where the work is turned over in a manner so negligently defective as to be imminently dangerous to third persons. *Young vs. Smith and Kelly Company*, 4 Am. & Eng. Ann. Cases, 226.

In *Pennsylvania Steel Company vs. The Contracting Company*, 175 Fed. Rep., 176, 180, the Court said that it was immaterial that the dangerous thing made and turned over by use for others is a structure instead of an article of commerce, such as a drug.

In *Snare and Tricst Company vs. Friedman*, 169 Fed. Rep. 1, a recovery was had against an independent contractor who had piled iron beams in a dangerous manner on a public sidewalk, and this without question of the independent contractor's control over his negligent work.

So also, *Smith vs. Elliott*, 9 Pa. 345, 346, and 347.

It is only where the thing constructed is *not imminently or inherently dangerous* that the rule exempting the contractor would be in point, assuming, of course, his control has terminated and he has made an actual and complete delivery.

## (8)

It is respectfully submitted that the Circuit Court of Appeals in the prior appeal (238 Fed. Rep. 129, relied upon in its present per curiam opinion) was wrong and that the evidence then and now leaves no room for doubt as to "whether the company should be regarded as an independent contractor, or as a master whose servants are permitted to accept temporary employment under another's control and direction." The Affidavit of Defense *admits* that it was "*the defendant*" that suspended the banner (P. R., p. 14).

This Affidavit of Defense moreover was of record *before* the first appeal by the defendant and was overlooked in the above statement by the Circuit Court of Appeals in 238 Fed. Rep., 129.

The character of the work undertaken by the defendant is immaterial. A corporation is liable for its *ultra vires* torts. *Chesapeake & Ohio R. R. Co. vs. Howard*, 178 U. S., 153; *National Bank vs. Graham*, 100 U. S., 699; *Hannon vs. Siegel-Cooper Co.*, 167 N. Y., 244; *Thompson on Corporations*, Vol. 5, page 225, sec. 5435.

## (9)

The Circuit Court of Appeals in 238 Fed. Rep., 129 (being its opinion on the former appeal cited in its last opinion now under review, P. R., p. 222) cited its still earlier opinion in 218 Fed. Rep., 60, a suit which the Electric Company's former counsel had brought, while

ostensibly representing Pancoast, against the municipality of Du Bois. Compare the appearance for Pancoast at page 61 of 218 Fed. Rep., with the appearance for the Electric Company at page 129 of 238 Fed. Rep., and it will be seen that it was the Electric Company's counsel that brought Pancoast's unfounded suit against the municipality, which the Circuit Court of Appeals properly reversed, but that unfounded litigation has never been a reason for denying justice to Pancoast or his estate against the real tort-feasor. This observation would have been unnecessary had the Circuit Court of Appeals based its opinion on the testimony in the record now under review in considering the judgment therein appealed from.

### III.

#### **The Plaintiff's Amendment Did Not Change the Cause of Action Nor Introduce a New One.**

On the appeal now under review, the defendant raised for the first time in the Appellate Court the question as to the effect of the Statute of Limitations on the amended Statement of Claim which had been filed by the plaintiff on April 27, 1916, before this case was ever in the Circuit Court of Appeals on the first appeal, and even before the trial resulting in the judgment for the plaintiff first appealed from.

#### (1)

This contention is as unmeritorious as it is untimely.



Effective January 1st, 1916, there was a new Practice Act in Pennsylvania (Act of May 14, 1915, Pamphlet Laws, p. 483; 6 Stewart's Purdon's Digest, p. 7137) pursuant to which plaintiff's amended statement was filed April 27, 1916. Under that Act the question of control by a defendant over the negligent instrumentality causing the injury sued for is specifically required to be put at issue. This was the sole purpose of the amended Statement and in no respect did it change the cause of action.

The cause of action as set forth in both original and amended Statements of Claim was the defendant's negligent *use* of the chimney as a tying post for the banner.

It was the fall of the bricks from the chimney that hurt Pancoast and their falling, which was on October 12, 1912, was due to the defendant's negligent *use* of the chimney. This is, and always has been, the plaintiff's cause of action against the defendant.

The amended Statement of Claim introduces no new cause of action, nor did it in any way change the cause of action as originally averred. In fact, the cause of action is set forth in the original and amended Statements in virtually identical words,—

*The cause of action averred in the original statement (P. R., p. 9),—*

“The falling of the bricks which caused the bodily injury to said Vernon W. Pancoast, as hereinabove stated, was due to the negligence of the

said defendant their agents or employees in their use of the said chimney as an anchor for said sign or banner, as hereinbefore set forth."

*The cause of action averred in the amended statement (P. R., p. 12),—*

"11. The falling of the bricks from said chimney which caused the bodily injuries to said Vernon W. Pancoast, as hereinbefore stated, was due to the negligence of the DuBois Electric Company, its officers, agents or employees, in the use of said chimney, as a fastening for said sign or banner as hereinabove set forth."

The defendant's counsel himself conceded that it is the above quoted paragraph that sets forth the plaintiff's cause of action. He presented a point to the trial Court (P. R., p. 204) as follows:

"Sixth. Under the *eleventh* paragraph of plaintiff's statement of claim in this case, which purports to set out the wrongful act which caused the injury to the plaintiff and under the evidence that the defendant was not in possession of the banner at the time it fell the plaintiff cannot recover and the verdict must be for the defendant."

And that, in fact, is the paragraph of the plaintiff's Statement wherein the cause of action is set forth.

Wherein, then, did the amendment affect the status? Simply in supporting and making more specific the original allegation that it in truth *was* the defendant that on October 12th made the negligent use which the original Statement of Claim averred.

The action was not on the contract of employment, but for the defendant's negligent *use*. To show the complete terms of the employment and that they embraced maintenance of the banner, simply established the verity of the original allegation that on October 12, 1912, when Pancoast was hurt, this defendant was negligently *using* this chimney as an anchor for this banner.

Without an employment embracing maintenance there would have been at the time *no use* at all by the defendant of the chimney, negligent or otherwise, as averred in the original and the amended Statements of Claim. *With* such employment, this original basic averment stood out clear and intact. Here was a mere specification of what had already been averred in general terms, to wit, the *defendant's user* on October 12th.

The plaintiff's action was in trespass, and the terms of the employment were material only in so far as they tended to establish the fact of the *defendant's use* of the chimney at the time Pancoast was hurt, which is averred alike in the original and amended Statements.

Had we sought to aver the fall of a different object, or the use of a different anchor, or the hanging of a different thing, the defendant might doubtless have complained, but no such departure was sought or made. On the contrary, under both pleadings, it was the same injury at the same time and place, to the same person, by the same chimney, pulled down by the same banner, due to the identical carelessness of the same tort-feasor.

There was thus no new, but the same, cause of action.

Not so, the many authorities which the defendant's counsel cited in support of its contention on its *last* appeal to the Circuit Court of Appeals,—the only time that the question of the Statute of Limitations has ever been argued.

Thus, in *Mahoney vs. Park Steel Company*, 217 Pa., 20, the statement alleged an unsafe rest or guide attached to the rolls, and the amendment, a spanner or handle attached to the screw at the housen,—two totally different things.

In *Martin vs. The Railways Company*, 227 Pa., 18, the statement alleged the running down of a pedestrian, the amendment the jerking of a passenger off the car.

In *Philadelphia, Applt., vs. The Railroad Company*, 203 Pa., 38, the statement was based on charters and ordinances, the amendment upon leases and mergers with other companies.

In *Lane vs. Water Co.*, 220 Pa., 599, originally malicious seizure of goods, changed to abuse of civil process.

In *Grier vs. Ins. Co.*, 183 Pa., 334, originally based upon policy of insurance, changed to parol agreement to pay loss.

In *Noonan vs. Pardee*, 200 Pa., 474, originally failure to furnish *vertical* support, changed to removal of *lateral* support.

And so of all the decisions cited. If *ex contractu*, the amendment sought to substitute a different writing, if *ex delicto*, a different instrumentality, or occurrence. Whereas, in the case at bar, there was no change in time, place, persons, actuating cause, instrumentality, or nature of the lack of care. The statement had imputed negligence to the defendant at a certain time and in a certain respect, to wit, in *its use* on October 12th, of a chimney as an anchor for a heavy banner. To show that the contract of employment embraced maintenance, simply established the truth of this allegation of negligence.

It will not be overlooked that the function of the Statute of Amendments is to enable parties freely to amend so that they may develop their proofs in accordance with the facts and in the furtherance of justice. It is only where the amendment after the bar of the statute of limitations introduces a new cause of action, that the Statutes of Amendments do not operate. Here there was no new cause of action, but only the original cause as set up in the original statement, to wit, *the defendant's negligent use on October 12th of the chimney as an anchor for the banner*.

As our amendment merely defined and more particularly specified what the original left general, it was properly allowed. *Stoner vs. Erisman*, 206 Pa. 600; *Fricke vs. Quinn*, 188 Pa., 474.

In *Rodrigue vs. Curcier*, 15 S. & R., (Pa.) 81, the wrong complained of was the defendant's misconduct as agent in the sale of certain cottons. In the original declaration, the employment was averred to be to the effect that the defendant had express orders to make immediate sale at the best price, which he promised to do but did not. The amendment *changed the terms of the employment* by averring a promise by the defendant to use due diligence, skill, and fidelity which he failed to use, and also that he agreed not to wait for an imaginary rise. The court held that the *wrong*, was the defendant's misconduct in relation to the sale of the cottons, and that the substance of the complaint was preserved, to wit, that the plaintiff had been injured by the defendant's mismanagement.

In *1 Enc. of Pl. and Pr.*, 563, it is stated that in suits founded on negligence, allegations of facts tending to establish the same act of negligence may properly be added by amendment.

In *Stewart vs. Kelly*, 16 Pa., 160, 162, the Pennsylvania Supreme Court says that the provisions of the Pennsylvania statute of amendments are mandatory, and that the act should receive a liberal construction. In that case the plaintiff declared upon an alleged delivery and was allowed to amend by averring *a readiness to deliver with a refusal to receive*, and the trial court was reversed for refusing the amendment, because the cause of action, to wit, the loss from the breach, was the same under both pleadings.

In *Painter vs. New River Mineral Company*, 98 Fed., 544, 548, the original declaration alleged that the defendant conveyed water and diverted a certain stream so that materials were deposited on the plaintiff's premises, whereas the amendment alleged that the water *flowed* from a different branch stream, due to the defendant's acts, by which the same consequences occurred. The court held that the cause of action was the causing of the deposit upon the premises, and that no new cause was introduced by the amendment.

The defendant's contention based on the Statute of Limitations is not only without merit but untimely.

(2)

The District Court allowed the plaintiff's amendment, when presented for filing, on *April 27, 1916*, (the defendant filing a mere formal objection) and noted an exception to the defendant (P. R., p. 218). The defendant thereafter on *May 5, 1916*, answered over by its *Avavit* of Defense (P. R., p. 14) to the plaintiff's amended statement, putting at issue such matters of defense as was required of it by the Pennsylvania Practice Act, above cited, to wit, the question of control.

Thereafter in *June, 1916*, the case came on for trial on these pleadings as filed, and resulted in a verdict and judgment for the plaintiff.

The question of the Statute of Limitations as to the plaintiff's amended statement was never argued before the trial Court, either before or after judgment.

The defendant appealed from this judgment to the Circuit Court of Appeals, and still the question as to the Statute of Limitations was neither argued in the Circuit Court of Appeals nor was it passed upon by that Court. The Circuit Court of Appeals reversed the judgment (238 Fed. Rep., 129) on the alleged want of control by the defendant, and ordered a new trial.

The case came on for retrial on *June 4, 1917*, and again resulted in a verdict and judgment for the plaintiff. Neither before nor after this judgment was the question of the plaintiff's amended Statement of Claim argued before the trial Court. Again the defendant appealed from the judgment for the plaintiff entered by the District Court on *January 18, 1918*, (P. R., p. 213), and it was not until *February 25, 1918*, that the defendant, by its Bill of Exceptions then filed (P. R., p. 8) on this last appeal, brought forth the exception noted by the District Court on *April 27, 1916*, to its allowance of the plaintiff's amended statement.

On this last appeal, the defendant, by assignment of error based on its Bill of Exceptions filed *February 25, 1918*, raised for the first time in the Circuit Court of Appeals its question as to the plaintiff's amended statement. The Circuit Court of Appeals, however, did not sustain the defendant's contention on this assignment of error, and rightly we respectfully submit, since two trials of the case, each resulting in a judgment for the plaintiff and an appeal therefrom by the defendant to the Circuit Court of Appeals, had been had, all without the question of the Statute of Limitations having



ever been raised by the defendant, or argued in either the trial Court or the Circuit Court of Appeals.

The defendant must be considered as having abandoned its formal exception noted on April 27, 1916, to the plaintiff's amended Statement. In fairness to the trial Court and the plaintiff, it was incumbent on the defendant to assign its exception to that Court's allowance of the plaintiff's amended Statement as error, if not for argument before the trial Court, at least for review in the Circuit Court of Appeals *on its first appeal*.

It was mistakenly asserted in the printed brief filed by the defendant in the Circuit Court of Appeals on its last appeal that the plaintiff's amended Statement of Claim was not filed until after the Circuit Court of Appeals' former decision (238 Fed. Rep., 129) in this case, and that the plaintiff was thereby seeking to conform its pleadings to that decision. *This is not correct.* The plaintiff's amended Statement was filed more than six months before this case was ever in the Circuit Court of Appeals *at all* and more than two months before the trial resulting in the judgment from which the defendant took its *first* appeal.

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Under the testimony adduced, as disclosed by the record under review, we respectfully submit that the case was clearly one for the jury.

The trial Court submitted the case in an impartial charge, fairly presenting the issues of fact in dispute and the law applicable thereto.

The verdict was moderate, and judgment was properly entered.

We respectfully submit, therefore, that the Circuit Court of Appeals erred in reversing the judgment of the District Court and that the judgment of the Circuit Court of Appeals should, now, be reversed, and the judgment of the District Court affirmed, with costs.

Respectfully submitted,

ALLEN J. HASTINGS,

JAMES R. STERRETT,

M. W. ACHESON, JR.,

CHARLES ALVIN JONES,

*Attorneys for Plaintiff.*

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MAR 9 1920

JAMES D. MAHER;  
CLERK.

# Supreme Court of the United States

OCTOBER TERM, 1919.

No. 300

FIDELITY TITLE AND TRUST COMPANY, Ancil-  
lary Administrator of the Estate of VERNON  
W. PANCOAST, Deceased, Petitioner,

vs.

THE DuBOIS ELECTRIC COMPANY.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT  
COURT OF APPEALS FOR THE THIRD CIRCUIT.

BRIEF ON BEHALF OF DEFENDANT.

W. C. MILLER

H. B. HARTSWICK

Clearfield, Pa.

Attorneys for Defendant.



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## COUNTER STATEMENT OF THE CASE.

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In October, 1912, the defendant company was employed by M. O. Skinner, Chairman of a political committee in the Borough of DuBois, to erect a political banner across East Long avenue in said Borough, stretching from the Deposit National Bank building on the south side of the street to the Commercial Hotel building on the north side of the street. The banner was put up by fastening the upper north corner to an iron strip fastened upon the roof of the Commercial Hotel building, a four story structure. The night following the erection of the banner the fastening at this point broke, probably by an abrasion of the rope or cable, by which the banner was fastened, where it passed over the cornice of the hotel building. The next morning the defendant re-erected said banner and in doing so substituted a wire cable for the rope originally used and fastened the end of it around the base of the chimney standing upon the roof.

After this work was done Skinner was informed of the condition of the work and how it had been prepared and accepted the work from the defendant. This was on the 7th day of October, 1912. The banner so remained without any further connection therewith on behalf of the defendant until the 12th day of October, 1912, when during a wind storm the banner blew down, taking with it the top of the chimney around which it was fastened and some of the bricks struck Vernon W.

Pancoast on the head as he was standing upon the sidewalk along side of the Commercial Hotel, causing the injuries complained of in this case.

This action of trespass was commenced on October 6th, 1914. Plaintiff filed his statement of claim on February 23, 1915, (P. R., p. 8) averring a careless and negligent erection of the banner.

On April 27, 1916, notwithstanding the objection of the defendant the plaintiff was permitted to file an amended statement of claim (P.R.,p.10) averring not only a negligent and careless erection of the banner but averring a duty on the part of the defendant to maintain said banner while suspended across the street; and that at the time of the accident the banner was under the control and supervision of the defendant.

On May 31, 1916, this case was called for trial following the filing of the amended statement by plaintiff. In that trial, however, the plaintiff did not attempt to offer any evidence to sustain the averment that defendant had undertaken to maintain said banner across the street, or that it was the defendant's duty to so maintain said banner, but the plaintiff tried the case on the theory that there had been a careless and negligent construction and erection of the banner by defendant which made the defendant liable for the injuries sustained by Vernon W. Pancoast. This trial resulted in a verdict in favor of the plaintiff. The defendant sued out a writ of error to the Circuit Court of Appeals for the Third District and the judgment of the trial court was reversed. The allowance of the amended statement was not assigned for error as the new matter averred in the amended statement was not



involved in the question then for decision (see 238 Fed. Rpts. 128).

The case was again called for trial on June 4, 1917. In this trial the plaintiff attempted to offer evidence to sustain the allegation contained in his amended statement of claim relative to the duty of the defendant to maintain said banner across the street, and that the banner was under the control and supervision of the defendant at the time of the accident. The case was tried upon the theory that, to entitle the plaintiff to recover, he must show a duty on the part of the defendant to maintain the banner while suspended, and that it was in the custody and control of the defendant at the time of the accident. This trial resulted in a verdict and judgment in favor of the plaintiff.

The defendant again sued out a writ of error to the Circuit Court of Appeals for the Third District and secured a reversal of this judgment upon the ground that the testimony of the plaintiff showing a duty on the part of the defendant to maintain the banner or that it was in the custody and control of the defendant was insufficient to submit to the jury.

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## ARGUMENT.

### I.

#### **Was the Judgment of Reversal Without a Direction for a New Trial Error?**

If we understand the practice in the Courts of the United States, the plaintiff is entitled to have a re-trial of the case upon a reversal of a judgment by the Appellate Court which has been entered on a verdict in favor of the plaintiff. We believe the authorities cited by the appellant sustained this position. If the reversal of the judgment in this case by the Circuit Court of Appeals, without directing a new trial of the case, concludes the plaintiff and prevents a re-trial of the case, we assume that the Circuit Court of Appeals committed error. But we are not ready to admit that the mere reversal of this judgment without directing a new trial does so conclude the plaintiff. The right of a re-trial is secured by the law regulating the practice and the mere failure of the Appellate Court to direct a new trial would not prevent the plaintiff from re-trying the case. If we are wrong in assuming that the plaintiff was entitled to a new trial upon a reversal of this judgment, or if we are right in assuming that the mere failure of the Circuit Court of Appeals to direct

a new trial would not prevent the plaintiff having such new trial, then the judgment of the Circuit Court of Appeals should be affirmed.

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## II.

### **Was the Evidence of Plaintiff Legally Sufficient to Submit to the Jury on the Question of Maintenance and Control of the Banner?**

When this case was tried in the District Court in May, 1916, it was tried by the plaintiff on the theory of a negligent erection and construction by the defendant. The defendant claimed that there had been no negligent erection and construction; but, if there had been such negligent erection and construction the defendant was only an independent contractor, and having surrendered possession of the banner to the owner prior to the accident, therefore, was not liable. The Circuit Court of Appeals in *DuBois Electric Company versus Fidelity Title & Trust Company*, 238 Federal Reporter, 129, says:

“The evidence leaves some room for doubt whether the company should be regarded as an independent contractor or as a master whose servants are permitted to accept temporary employment under another’s control and direction” \*  
\* \* \* . For present purposes we shall

treat the contract as an independent employment but clearly it had a very limited object."

The Court also says:

"The only ground, therefore, for holding the defendant liable to Pancoast would be a continuing duty resting upon the company so to maintain the banner that persons on the street should not be endangered. The plaintiff's difficulty is that no facts were proved to support the inference of such a duty. The company's only relation to the work grew out of its employment by Skinner which was limited in scope and time and had been fully performed."

The opinion and judgment of the court is amply sustained by the Pennsylvania and other authorities therein cited.

Upon the re-trial of this case in June, 1917, the plaintiff attempted to meet the requirements of this ruling by proving that there was a contract between M. O. Skinner and the defendant company, under the terms of which the company agreed to erect the banner, take it down after the election and to maintain it between the time of its erection and the time it was to be taken down. The case was tried upon the theory that there could be no recovery in this case unless the plaintiff established a continuing duty resting upon the company to so maintain the banner that persons on the street should not be endangered.

To establish this contention the plaintiff called M. O. Skinner, who testified as fol-

lows (P. R., p. 28): "I went to the DuBois Electric Company and asked them to put the banner up for me, and when the election was over to take it down, telling them I wanted nothing to do with it; I wanted them to attend to it. I didn't want to go on the roof. After some little discussion two of the employees of the electric company went with me to the club rooms and secured the banner and brought it down."

Again he says, (P. R., p. 20): "I went to the electric company and asked them to put up the banner and take it down after the election, stating to them that I didn't want to have anything to do with it, I wouldn't go on the roof and wanted them to attend to it. That was my statement at the time". In P. R., page 27, appears this question and answer:

Q. Did you have any further conversation with them, then about the matter?

A. Nothing more than the two fellows were sent with me to get the banner.

In P. R., p. 23, appears this question and answer:

Q. Did you give any directions to them to remove it?

A. Nothing more than when I asked them to put it up, I wanted them to take it down.

In P. R., p. 37, appears these questions and answers:

Q. At the time you left the office down there, you

simply had the intention of having them take the banner down after the election?

A. Yes.

Q. And there wasn't any definite arrangement made at that time that they were to take it down after the election.

A. No, sir.

This is the evidence upon which the plaintiff relied to establish the duty upon the defendant of maintaining this banner and showing that it was under the control of the defendant at the time of the accident. The defendant contends that this testimony was insufficient for this purpose; and that there was nothing to submit to the jury. The sufficiency of the testimony to establish a fact, if believed, is always to be determined first by the Court.

Whether there is evidence of a fact is always a matter of law, and whether the evidence is sufficient is a matter of law. Whether the evidence be written or parol the rule is the same. In every case the court must first determine whether the plaintiff has submitted sufficient testimony in support of the allegation to sustain a finding by the jury in favor of the plaintiff. The burden was on the plaintiff to show a contract on the part of the company to maintain this banner. Without such a contract there would be no continuing liability or duty resting upon the defendant. Without such a continuing liability or duty there was no duty owed by the company to Pancoast. While the defendant denies the contract as testified to by Skinner, we treat the testimony of Skinner, for the purpose of this

case, as true and as admitted; but deny that it establishes a contract of maintenance, or that it is sufficient to sustain an inference of such a contract on the part of the defendant. It was the duty of the court to say to the jury that the contract as testified to by Skinner was legally insufficient to impose upon the defendant the burden of maintaining this banner while suspended across the street, and that the alleged contract did not put the control of this banner in the company at the time of the accident.

Skinner's testimony shows that there were only two things talked about, viz: The putting up of the banner and taking it down after election. When he says:

"I wanted them to attend to it, I didn't want to go on the roof,"

the word "it" refers to the two things spoken of by Skinner. These were to put up the banner and take it down after the election. No proper interpretation of this language can possibly make a contract to maintain the banner between the time of its erection and the time it was to be taken down. It was the duty of the court to aid and guide the jury by passing upon the legal sufficiency of the testimony to establish the contract averred or the continuing duty resting upon the defendant. In place of doing this the jury was permitted to simply guess at the matter and to determine, without any rule to govern them, whether this language imposed upon the defendant the duty of maintaining the banner.

We maintain that whether the action be in contract or in tort, and whether the evidence be written or parol, it is the duty of the court to determine

whether or not the evidence on the part of the plaintiff is sufficient, if believed by the jury, to establish the averments of fact.

The preliminary question of law for the court is not whether there is literally no evidence or a mere scintilla, but whether there is anything that ought reasonably to satisfy the jury that the fact sought to be proved is established. If there is evidence from which the jury can properly find the question for the parties or whom the burden of proof rests it should be submitted; if not, it should be withdrawn.

Hyatt vs. Johnson 91 Pa. 196-200

McKnight vs. Bell, 135 Pa., 358-372

Burk vs. Burk, 240 Pa., 379-387

In *Bannon vs. P. R. R.*, 29 Pa., Sup. Ct. 231, on page 238, Orlady, Justice, says: "In every jury trial there is a preliminary question for the court. The court must decide whether or not there is sufficient evidence on which the jury could base a verdict for the plaintiff. If there is no evidence or if it is such that in a fair, legal construction it does not sustain the plaintiff's case and that no fair inference to be drawn from it, sustains it, the court should give the pre-emptory instructions to find for the defendant."

In *Howard Express Company vs. Wile*, 64 Pa., 201, Sharswood, Justice, says: "But in a case in which a court ought to say that there is no evidence sufficient to authorize the inference, then the verdict would be without evidence, not contrary to the weight of it. When-



ever this is so, they have the right and it is their duty to withhold it from the jury."

In *Lanning vs. Pittsburgh R. Co.*, 229 Pa., 575. Brown, Justice, says: "The error complained of is that he (the court below) permitted them (the jury) to pass upon the question of the defendant's negligence without any evidence to support it. Whether there was any such evidence was a preliminary question for the court, whose duty it was to have withdrawn the case from the jury, if there was no evidence that ought reasonably to have satisfied them of the negligence which the plaintiffs were called upon to prove."

In *Codding vs. Wood*, 112 Pa., 371, it was attempted to establish a contract by parol evidence. The Supreme Court held that taking the evidence as true it was insufficient to establish the contention claimed for.

In *Elliott vs. Wanamaker*, 155 Pa., page 67, an oral contract was involved. The Supreme Court says: "The province of a jury is to settle disputed questions of fact. If no such disputed facts exist there is nothing for them to do and it is for the court to determine the legal effect of the contract".

In the above case the plaintiff contended that the court could not pass upon the sufficiency or legal effect of the plaintiff's testimony because the alleged contract was parol; that the case should be submitted to the jury to determine what the contract was, and to determine the rights of the parties. The Supreme Court refused to adopt this view.

In *Penniston vs. Huber Company*, 196 Pa., 580, an alleged parole contract was involved. It is there decided that disputed facts connected with the discharging of an employee are for the jury; but whether such discharge was proper under undisputed or admitted conditions is for the court. On page 585 Justice Brown says:

"This was insubordination and misconduct fully justifying his discharge, and the learned trial judge should have so instructed the jury instead of allowing them to determine whether he had been dismissed from service improperly and without cause."

When the facts are admitted or there is no dispute as to the parole testimony relied upon to establish the contract, whether the testimony is sufficient to establish the contract, and its force and legal effect are questions of law for the court.

*Eric Forge Company vs. Pa. Iron Works Company*, 22 Pa., Sup. Ct. 550.

Whether spoken words constitute a contract of warranty of personal property sold is a question of law for the court. The words spoken are not to be submitted to the jury and the jury permitted to determine whether there was a contract between the parties or not. The legal effect of the words is first for the court. If the words spoken are insufficient in law to establish the contract claimed then there is nothing to be submitted to the jury and the court should give binding instructions for the defendant.

*Holmes vs. Tyson*, 147 Pa. 305

*Wilkinson vs. Stitler*, 46 Pa., Sup. Ct. 407

Where there is evidence which would justify an inference of a disputed fact it must go to the jury, but not where there is no evidence to authorize the inference; and when oral testimony fails to establish a disputed fact the judge should withhold it.

Maynes vs. Atwater, 88 Pa. 496

When there is no dispute as to the terms of the oral contract its construction is for the court, and it is as much the duty of the court to interpret oral contracts as written ones.

9 Cyc. 786

Where the terms of an oral contract are shown without any conflict of evidence its interpretation, as in the case of written contracts, is a question of law for the court.

9 Cyc. 592

The burden rested upon the plaintiff to establish a continuing duty on the defendant to so maintain this banner that persons on the street should not be endangered. There would be no such duty unless the defendant company had been employed so to maintain the banner between the time of its suspension and the time of taking it down. If the plaintiff failed to offer testimony legally sufficient to sustain the finding by the jury that there was such a contract on the part of the defendant, it was the duty of the court to refuse to submit the testimony to the jury. We submit that the Circuit Court of Appeals was right in holding such testimony too vague, indefinite and uncertain, and in reversing the court below on this point. The Circuit

Court of Appeals should be affirmed as to this part of the case.

### III.

#### **Did the Plaintiff's Amendment to Its Statement Change the Cause of Action and Introduce a New Ore ?**

In plaintiff's original statement (P. R., p. 8) it was alleged that the defendant constructed, erected or stretched the banner across the street, and that its employment covered nothing more. In plaintiff's amended statement (P. R., p. 10) it is averred that the contract by the defendant covered the maintenance of said banner across said street and that the defendant did so maintain said banner. In the original statement the plaintiff claims the defendant was liable for these injuries by reason of its negligence in the construction and erection of the banner. This would be the cause of action. The amended statement charges not only negligence in the original erection of this banner, but it charges the duty of maintenance, avers the control and supervision of the banner to be with the defendant, and that the accident was the result of negligence on the part of the defendant in not maintaining this banner in a safe condition while it was in the control and supervision of the defendant. The cause of action relied upon here was the violation of the duty of maintenance and proper control and supervision. Is there

not an entirely new cause of action averred in the amended statement?

Under the first statement the investigation would be confined to an inquiry as to two questions:

- (a) What was the character of the original construction?
- (b) Was the work upon its completion surrendered to the owner?

Under the amended statement entirely new questions of investigation were raised:

- (a) Had the defendant agreed to maintain the banner?
- (b) Was there a duty resting upon the defendant to maintain this banner?
- (c) Was the banner under the control and jurisdiction of the defendant?
- (d) Was the accident caused by the failure of the defendant to properly maintain the banner?

If the amended statement introduced a new cause of action, to-wit: the duty on the part of the defendant to maintain this banner across the street, it was barred by the statute of limitations at the time that it was allowed. It was under this new averment of this new duty that the plaintiff sought to recover in the last trial of the case. Without such an averment in the pleadings there could be no recovery. That a party will not be permitted to shift his ground or enlarge his surface by introducing a new and different cause of action barred

by the Statute of Limitations is well settled by the law of Pennsylvania.

Philadelphia vs. R. R. Co., 203 Pa. 38

Mahoning vs. Park Steel Co., 217 Pa. 20

Martin vs. Pittsburgh Railways Company, 227 Pa., 18.

A cause of action in a personal injury case of this character involves a duty which the defendant owes to the plaintiff, a violation of that duty by the defendant and an injury resulting to the plaintiff thereby. It is always necessary to aver the duty, the violation thereof and the resultant injury. When this is done it constitutes the cause of action. Nothing was averred in the original statement about the duty of maintaining this banner, no violation of such duty was averred and no injury resulting to the defendant by reason of the violation of that duty was so averred. This was set forth only in the amended statement. It is a shifting of the ground upon which the plaintiff seeks to recover from the defendant, and being barred by the Statute of Limitations, the amendment should not have been allowed.

In *Lane vs. Sayre Water Company*, 220 Pa., 599, a change in the statement from the averment of a malicious seizure of goods by unlawful process to an averment of an abuse of civil process by an excessive seizure of goods was refused after the expiration of the Statute of Limitations.

In *Grier vs. Northern Assurance Company*, 183 Pa., 334, suit was brought on the policy of insurance. After the Statute of Limitations had run the plaintiff

amended by averring the parol agreement by the company to pay the loss. This was held to be a new cause of action.

In *Card vs. Slowers Port P. & P. Co.*, 253 Pa., 575, the action was a common law action for negligence. After the Statute of Limitations had run the plaintiff attempted to change his cause of action by alleging negligence in failing to guard a crank shaft as required by the Act of May 2nd, 1905, P. L. 352. Such amendment was not allowed.

In *Noonan versus Pardee*, 200 Pa., 474, suit was brought to recover damages for the failure to furnish vertical support to the surface in mining underneath. Plaintiff subsequently attempted to amend by averring the removal of the lateral support. This was held to be a new cause of action and the amendment could not be allowed after the running of the Statute of Limitations.

In *Mifflintown Bank vs. New Kensington Bank*, 247 Pa., 40, the original statement averred the cause of action as a contract for the purchase of "bills of lading for grain", after the statute of limitations had run plaintiff proposed to amend its statement by averring that the contract was for the purchase of "sight drafts with bills of lading for grain attached thereto". The Supreme Court held that this introduced a new cause of action and could not be allowed after the Statute had run.

The allowance of this amendment is *res adjudicata*, so as to prevent the defendant from objecting to

the enforcement of the amendment, if it appears that it was improperly allowed.

Grier Bros. vs. Assurance Company, 183 Pa., 334

It was not necessary for the defendant to plead the Statute of Limitations in this action of trespass in order to enable it to object to the allowance of the amendment, or to have the matter reviewed upon appeal.

Martin vs. Pgh. Rys. Co., 227 Pa., 18

Was the defendant precluded from raising this question at the time this case was last argued in the Circuit Court of Appeals? The allowance of this amendment was not assigned as error at the time the case was argued in the Circuit Court of Appeals, report of which is made in 238 Federal Reporter, page 129. There was no necessity in raising this question at that time. The case had been tried in the court below on the averment of the negligent construction and erection of the banner, and the alleged duty of the defendant to maintain the banner was not involved in that trial. All the evidence that was submitted by the plaintiff upon that trial of the case could have been admitted under the original statement averring only a negligent construction and erection. This same averment was also contained in the amended statement and this testimony was also relevant to that averment. It was only after the reversal of the case by the Circuit Court of Appeals as reported in 238 Federal Reports, 129, that the plaintiff attempted to make use of the new cause of action as alleged in the amended statement. When this was done and the testimony admitted for the purpose of es-



tablishing this new duty then it became necessary for the defendant to raise this question on appeal. The allowance of this amendment was assigned for error. It is true that the Circuit Court of Appeals did not pass upon this assignment but rested its opinion upon the insufficiency of the evidence to establish a contract on the part of the defendant to maintain this banner across the street, but we maintain that this question is still in this case, and that the plaintiff had no legal right to the amendment as allowed. The objections made to this amended statement by the defendant were not informal. In P. R., p. 218, will be found the objections as made at the time by the defendant. They are full and complete and sufficient to protect the interests of the defendant.

Even if the plaintiff would be entitled to a re-trial of this case, we submit that the Circuit Court of Appeals should be affirmed in holding that the testimony in this case was insufficient to establish a continuing duty to maintain this banner across the street, and that no recovery could be had by the plaintiff against the defendant under the evidence as contained in this record. We further maintain that the plaintiff was not entitled to file its amended statement of April 27, 1916.

All of which is respectfully submitted.

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Attorneys for Defendant.

FIDELITY TITLE & TRUST COMPANY, ANCIL-  
LARY ADMINISTRATOR OF PANCOAST, *v.* DU-  
BOIS ELECTRIC COMPANY.

CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE  
THIRD CIRCUIT.

No. 300. Argued March 25, 26, 1920.—Decided June 1, 1920.

In reversing a judgment on a verdict in an action at law for damages, the Circuit Court of Appeals should order a new trial, but where it fails to do so this court, on certiorari, may inquire whether that court was wrong on the merits and, finding it so, may affirm the judgment of the District Court. P. 213.

A man is not free to introduce a danger into public places, even if he be under no contract with the persons subjected to the risk. P. 214.

One who creates and arranges for the continuation of dangerous conditions of which he alone knows, cannot escape responsibility for a resulting injury by stepping out of their control a few days before the injury occurs. P. 215.

A, having been furnished with a banner by B, and having, at B's request, undertaken to hang it across a public street and later take it down, assuming full control, suspended it between opposite buildings by a cable one end of which A negligently attached to a weakly constructed chimney; several days later, A retaining control, the banner dragged the chimney over in a storm and C was injured by a falling brick in the street below. *Held*, that A was liable to C. P. 213.

An amendment to a declaration which leaves the original cause of action unchanged is not objectionable because made after the running of the statute of limitations. P. 216.

253 Fed. Rep. 987, reversed.

THE case is stated in the opinion.

*Mr. Charles Alvin Jones*, with whom *Mr. Allen J. Hastings*, *Mr. James R. Sterrett* and *Mr. M. W. Acheson, Jr.*, were on the brief, for petitioner.

*Mr. W. C. Miller*, with whom *Mr. H. B. Hartswick* was on the brief, for respondent.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is an action begun by Pancoast, to recover for personal injuries, and continued after his death by the petitioner as ancillary administrator. At a former trial the plaintiff had a verdict but it was set aside and a new trial ordered by the Circuit Court of Appeals. 238 Fed. Rep. 129, 132. 151 C. C. A. 205. At the new trial the plaintiff again got a verdict and judgment, but the Circuit Court of Appeals set them aside, this time simply reversing the judgment without ordering a new trial. 253 Fed. Rep. 987. An opportunity was allowed to that Court to correct the error and as it was not corrected the present writ of certiorari was granted. 249 U. S. 606, 597. Of course if the judgment of the Circuit Court of Appeals was right on the merits a new trial should have been ordered. *Slocum v. New York Life Insurance Co.*, 228 U. S. 364. *Myers v. Pittsburgh Coal Co.*, 233 U. S. 184, 189. But as it has been necessary to direct the record to be certified up, it is necessary also to consider the merits of the case and to determine whether the Circuit Court of Appeals was right with regard to them.

Nothing turns upon the form of the pleadings. The evidence for the plaintiff was in conflict with that for the defendant upon important points, but we shall state the case as the jury might have found it to be if they believed the plaintiff's evidence, as the verdict shows they did.—A member of a political party requested the defendant to suspend a political banner, which he furnished, across one of the principal streets in the borough of Dubois, between the Commercial Hotel and the Deposit National Bank. He asked the defendant to put it up, take it down after the election and attend to it for him, saying that he did not want to have anything to do with it. The defendant put up the banner, at first suspending it by a

rope, but the rope breaking, substituted for it a wire cable of the defendant's, and, the plaintiff says, did so without further orders. This cable was fastened on the hotel side by taking two turns round a chimney and clamping the end. The chimney stood thirty-one inches from the edge of the cornice over the street, was twenty-one inches square at the base, and had a tin flashing from the roof inserted between the courses of brick two or three courses above the roof. According to the plaintiff's evidence the cable was attached above the flashing. The lower corners of the banner were attached to the buildings on their respective sides. Five days after the banner was suspended the man who employed the defendant caused it to string electric lights along the wire, not otherwise interfering with the work. The same day in the afternoon, the weather being stormy, the banner dragged the chimney over and a brick struck Pancoast on the head, making a comminuted fracture of the skull. The defendant put up the banner a third time after this fall, again, the plaintiff says, without further direction, and when the election was over took it down.

If these were the facts, and, except with regard to the extent or the defendant's control, they could not be disputed, manifestly the verdict was warranted. It did not leave the defendant free from any duty to Pancoast and the other travellers in the street that they had no contract with it. An act of this kind that reasonable care would have shown to endanger life, might have made the actor guilty of manslaughter, if not, in an extreme case, of murder. *Rigmaidon's Case*, Lewin, 180. See *Nash v. United States*, 229 U. S. 373, 377. *Commonwealth v. Pierce*, 138 Massachusetts, 165, 178. The same considerations apply to civil liability for personal injuries from similar causes that would have been avoided by reasonable care. See *Gray v. Boston Gas Light Co.*, 114 Massachusetts, 149. A man is not free to introduce a danger

into public places even if he be under no contract with the persons subjected to the risk.

It hardly is denied that there was evidence of negligence, but it was held by the Circuit Court of Appeals that the defendant's relation to the work ceased when the banner was hung, that it had no further control over it and was not liable for what happened thereafter. Of course it is true that when the presence or absence of danger depends upon the subsequent conduct of the person to whom control is surrendered, the previous possessor may be exonerated when the control is changed. *Curtin v. Somerset*, 140 Pa. St. 70. *Murphey v. Caralli*, 3 Hurlst. & Colt. 462. *Thornton v. Dow*, 60 Washington, 622. *Glynn v. Central R. R. Co.*, 175 Massachusetts, 510. *Clifford v. Atlantic Cotton Mills*, 146 Massachusetts, 47, 48. But how far this principle will be carried may be uncertain, *Union Stock Yards Co. v. Chicago, Burlington & Quincy R. R. Co.*, 196 U. S. 217, 223, and when as here the danger had been called fully into existence by the defendant it could not escape liability for the result of conditions that it alone knew, had created and had arranged to have continue, by stepping out of the control a few days before the event came to pass. *Harris v. James*, 45 L. J., Q. B. 545. *Todd v. Flight*, 9 C. B. N. S. 377. *Swords v. Edgar*, 59 N. Y. 28. *Godley v. Hagerty*, 20 Pa. St. 387. *Joyce v. Martin*, 15 R. I. 558. *Jackman v. Arlington Mills*, 137 Massachusetts, 277, 283. *Dalay v. Savage*, 145 Massachusetts, 38, 41. *Clifford v. Atlantic Cotton Mills*, 146 Massachusetts, 47, 49.

But it could not be said as matter of law that the defendant had stepped out of control. The facts in their legal aspect probably were somewhat hazy. Presumably the tenant of the hotel simply permitted what was done and had no other relation to it than such as might be imposed upon him by the law. Evidently the defendant handled the banner when it wanted to, and no one else

touched it. The defendant's employer if he told the truth not only did not intermeddle but might be found to have expressly required the defendant to take the responsibility. All the probabilities are that such control as there was remained with the defendant. The defendant got more than it was entitled to when the jury were instructed that even if the fall was due to negligence in putting up the banner, the defendant would not be liable unless by arrangement it had assumed a continuing duty to maintain the banner in a safe condition. The testimony on the two sides was contrasted and it was left to the jury to say which they would believe.

As we have implied, we regard it as too plain for discussion that the plaintiff's evidence if believed warranted a finding that the defendant undertook the care of the banner while it was up. An effort is made to establish an error in allowing an amendment to the declaration after the statute of limitations had run. The declaration originally alleged negligence in the use of the chimney and that the fall was due to the use of the chimney as alleged. The amendment alleged also that defendant maintained the banner. If any objection is open it is enough to say that the original declaration was sufficient and that the amendment plainly left the cause of action unchanged.

*Judgment reversed.*

*Judgment of the District Court affirmed.*